

No.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

MICHAEL ANGELO MORALES,

Petitioner-Appellant

v.

STEVEN ORNOSKI, Acting Warden  
of California State Prison at  
San Quentin,

Respondent-Appellee

**DEATH PENALTY CASE**

**EXECUTION IMMINENT:  
February 21, 2006, at 12:01 a.m.**

Related to Ninth Circuit  
Case No. 99-99020

**APPLICATION TO FILE SUCCESSOR PETITION FOR WRIT OF HABEAS  
CORPUS AND REQUEST FOR STAY OF EXECUTION**

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## **INTRODUCTION**

Michael Morales moves this Court, pursuant to 28 U.S.C. Section 2244(b), to permit the filing of his successor petition for writ of habeas corpus to give effect to the considered conclusion of the trial judge, the Honorable Charles R. McGrath, that the State should not execute a man who is innocent of capital murder. The petition, which is attached to this Motion, rests on recently discovered facts that the state concealed for decades after the trial, which now indisputably demonstrate that the State's fraudulent presentation of perjured testimony through its key witness misled the jury and Judge McGrath to convict Michael Morales and sentence him to death. Judge McGrath has made it clear he "would not have let the death sentence stand" had he been apprised of the new evidence showing "the cornerstone" of the prosecution's case to be false. Exhibit 1 at 1, 3.

The testimony of jailhouse informant Bruce Samuelson supplied the State's "indispensable" proof of capital murder. Exhibit 1 at 2. Samuelson testified, among other things, that Mr. Morales confessed that he and his co-defendant, Ricky Ortega, had a pre-existing plan and intent to murder the victim. This aspect of Samuelson's testimony provide the factual predicate for the lying-in-wait special circumstance that underlies Mr. Morales's death-eligibility. More than a decade after trial, in 1993, Samuelson

informed a Deputy Attorney General for the State of California that he was able to obtain a detailed confession from Mr. Morales, while the two were within easy earshot of other inmates and jailers, only because he and Mr. Morales discussed the case exclusively in “fluent” Spanish. Exhibit 15, Excerpt from Transcript of Interview of Bruce Samuelson – August 4, 1993, at 23-24, 27. It is now undisputed that Mr. Morales does not speak, and never has spoken, Spanish. *See, e.g.*, Exhibits 16, Declaration of Lisa Flynn; 17, Declaration of John Morales; 18, Declaration of Josie Morales; and 19, Declaration of Leonard Lucero.

The State does not dispute that Samuelson lied or that his lie demonstrates that, in fact, he did not obtain any confession at all. Instead, for over thirteen years the State has contended the trial prosecutor was unaware of Samuelson’s falsehood, and/or that Samuelson’s testimony was not “material.”<sup>1</sup>

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<sup>1</sup> The Attorney General’s arguments are now familiar to this Court in cases in which the Attorney General attempts to salvage the San Joaquin County District Attorney’s death judgments that are based on presentation of false testimony: *See Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc) (granting new trial based on San Joaquin County prosecutor elicitation of false testimony during 1981 capital trial); *see Belmontes v. Brown*, 414 F.3d 1094, 1115 (9th Cir. 2005) (San Joaquin County prosecutor violated obligation to “correct the false testimony and elicit the truth” regarding government favors to informant in capital trial arising out of 1981

Recently disclosed evidence refutes the State on both points. Declarations from Samuelson's defense attorney, as well as the judge who approved a deal that Samuelson demanded in exchange for his testimony, now demonstrate that Deputy District Attorney Bernard Garber told Superior Court Judge K. Peter Saiers "he needed Mr. Samuelson's testimony to get a capital conviction against Mr. Morales" and "literally begg[ed]" the judge "for the deal." *See* Exhibit 3, Declaration of John Schick, Esq. at 2; Exhibit 4, Declaration of Judge K. Peter Saiers, at 1. This evidence is corroborated by the prosecutor's own file notes recommending a deal for Samuelson because he was "a key witness in *Peo[ple] v. Michael Morales* 187 w/ *specials*." Exhibit 2, District Attorney's Position Sheet on Bruce Samuelson (emphasis added).

The recently obtained evidence also demonstrates that the prosecutor *knew* Samuelson lied to the jury when he denied he had been guaranteed a deal that spared him from a state prison sentence on his six new felony charges and his pending felony probation violation. As a result of prosecutor Bernard Garber's "begging," Judge Saiers approved an explicit

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homicide); *Morris v. United States District Court (In re Morris)*, 363 F.3d 891, 893 (9th Cir. 2004) (almost two decades after death sentence imposed, District Attorney turned over trial prosecutor's file with notation that key witness "perjured herself at trial").



deal limiting Samuelson's sentence to a year in the county jail. Ex. 3 at 2. Only after "Mr. Garber essentially act[ed] as Mr. Samuelson's attorney," and secured the deal did Samuelson testify against Mr. Morales. *Id.*

After personally securing the deal, Deputy District Attorney Bernard Garber then intentionally elicited Samuelson's false testimony that the prosecutor had offered only to "recommend a one-year county jail sentence." RT 2341. Prosecutor Garber then remained silent as Samuelson repeatedly lied to Mr. Morales's jury on cross-examination in testifying that (1) the prosecutor agreed only to make "a recommendation" on his sentence; (2) they had not worked out the "circumstances" of sentence credits; (3) the authorities still had to resolve his probation violation; and (4) his case had been continued until April 11, 1983 for an order to show cause on the felony probation violation and a pre-trial hearing on his pending charges. RT 2372-73. In fact, as Garber well knew, all of the details had been explicitly worked out so that Samuelson was *guaranteed* probation with a year in the county jail as a disposition of all of his new felony charges and his felony probation.

The recently disclosed evidence thus demonstrates that *all* of the testimony from this "key witness" the prosecution "needed . . . to get a capital conviction" was a lie. *Everything* Samuelson claimed Mr. Morales

said in his purported confession was necessarily fabricated, and *everything* Samuelson told the jury about the deal he was getting in exchange for his false testimony was a lie.

The centrality of this utterly false testimony in supplying proof of capital murder further demonstrates that Mr. Morales's showing satisfies the prerequisites of this Court's "gatekeeper" functions pursuant to section 2244(b)(2). As the trial judge has recently explained, Samuelson's testimony was "the cornerstone" of the prosecution's case, and "was indispensable to proving the lying-in-wait special circumstance finding upon which Mr. Morales's eligibility for a death sentence now rests." Ex. 1 at 1-2. The new evidence demonstrates Samuelson's testimony was false and both "his testimony, and the prosecution's case," are "insufficient to support the death sentence." *Id.* at 2.

The new evidence, including the prosecution's knowing introduction of false testimony and Judge McGrath's consideration of the impeachment contained in Samuelson's 1993 statement to the Attorney General, could not have been developed and presented in the exercise of due diligence prior to January 2006. Following the denial of Mr. Morales's petition for writ of certiorari in October 2005, the Governor's Office notified Mr. Morales's counsel by letter dated December 27, 2005, of a schedule for the submission

of clemency materials. Although a trial judge is required to respond to a request from the Governor's Office or the Board of Prison Terms for his evaluation and recommendation regarding the propriety of granting clemency (Cal. Pen. Codes § 4803), he or she is ethically prohibited from doing so in the absence of such a request. *See Cannons of Judicial Ethics*, 2B(2); California Judicial Conduct Handbook §8.26 (2d ed. 1999). Accordingly, prior to the commencement of formal clemency proceedings, Mr. Morales could not have obtained or presented this empirical evidence of the impact of Samuelson's perjury – or the prosecution's failure to disclose impeaching evidence – on the outcome of the trial.

Similarly, the submission of Mr. Morales's clemency petition, which was based in part on Samuelson's false testimony and Judge McGrath's recommendation in favor of clemency, generated a news reporter's call to Mr. Samuelson's attorney, John Schick. The call, and a subsequent news article, caused Mr. Schick to recall the particulars of Samuelson's and Garber's dealings with Judge Saiers, including Judge Saiers warning that even if Samuelson "turned in Attila the Hun," he would not get any deals in the future. Ex. 3 at 2-3. After he related his recollections to a colleague at the Habeas Corpus Resource Center, Mr. Schick was contacted by a representative of Mr. Morales's attorney and provided a declaration setting

forth the newly disclosed information. *Id.* at 3. Prior to this fortuitous series of events, Mr. Morales was not obligated to *assume* prosecutorial misconduct and interview all witnesses who might know of the prosecutor's duplicity. *See Williams v. Taylor*, 529 U.S. 420, 443-44 (2000) (no duty to search public records in face of prosecutor's and juror's silence about pre-existing professional relationship).

In turn, the "evidence as a whole" – including the extent of Samuelson's demonstrable sociopathy, the co-defendant's early statements to police explaining there was never an intent to kill the victim and the absence of any credible evidence of a pre-existing intent to kill – constitutes a clear and convincing showing that but for the State's misconduct, no reasonable fact-finder would have convicted Mr. Morales of capital murder.

The judge who presided at Mr. Morales's trial, and the trial of his co-defendant, conscientiously and carefully reviewed the evidence as it appeared to be, and unflinchingly "performed the most solemn duty a judge is asked to undertake." He "sentenced Mr. Morales to be executed in San Quentin Prison." Exhibit 1 at 1. Now, he has just as soberly reviewed the new evidence that undermines the legal and moral legitimacy of the death judgment, and has concluded that if he had known the truth at trial, he would have concluded the evidence was insufficient to condemn Mr. Morales to

death. The disclosure of this evidence comes too late to permit Judge McGrath to do what he knows is compelled by the law and human decency. The timing, however, makes this precisely the type of case for which Section 2244(b) reserves a corrective mechanism in federal court.

Mr. Morales should be permitted to file his petition, and invoke constitutional protection against an unwarranted execution that Judge McGrath observes “would frustrate the design of [California’s] sentencing laws, and would constitute a grievous and freakish injustice.” Exhibit 1 at 3.

## **I. STANDARDS AUTHORIZING CONSIDERATION OF SUCCESSOR HABEAS PETITIONS**

The “gatekeeper” provisions of Title 28 U.S.C. Section 2244(b)(2)(B) and (b)(3), require this Court to decide whether the district court should be permitted to consider claims raised for the first time in a second or successive habeas corpus petition. The “new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what used to be called in habeas corpus practice ‘abuse of the writ.’” *Stewart v. Martinez-Villareal*, 523 U.S. 637, 641 (1998) (quoting *Felker v. Turpin*, 518 U.S. 651, 657, 664 (1996)).

### **A. Claims That Were Not Ripe For Inclusion In The First Petition Are Not Subject To The Terms Of Section 2254(b)**

The requirements of 28 U.S.C. section 2244(b) are inapplicable to

claims predicated on events occurring after the final disposition of the first habeas corpus petition. *See Stewart*, 523 U.S. at 644-45 (claim based on petitioner's incompetence to be executed was not second or successive application for habeas relief under AEDPA); *see also Hill v. State of Alaska*, 297 F.3d 895, 898-99 (9th Cir. 2002) (permission to file successive habeas petition was unnecessary because claims challenging parole date "could not have been included in earlier petitions challenging his conviction and sentence"); *In re Cain*, 137 F.3d 234, 235 (5th Cir. 1998) (second habeas petition challenging loss of good time credits in prison was not successive where the loss had not yet occurred by the time the earlier petition was resolved).

**B. The Prima Facie Showing Required By Section 2244(b)**

Authorization to consider new habeas corpus claims requires a petitioner to first make a prima facie showing that (1) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (2) the claim is based on facts that, if proven and viewed in light of the evidence as a whole, would constitute clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the petitioner guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(B). A "prima facie showing" is established by "a

sufficient showing of possible merit to warrant a fuller exploration by the district court.” *Flowers v. Walter*, 239 F.3d 1096 (9th Cir. 2001) (emphasis omitted) (quoting *Woratzeck v. Stewart*, 118 F.3d 648, 650 (9th Cir. 1997) (per curiam) (quoting *Bennett v. United States*, 119 F.3d 468 (5th Cir. 1997))); *see also Bell v. United States*, 296 F.3d 127, 128 (2d Cir. 2002) (per curiam) (“a prima facie showing is not a particularly high standard”). “[If] . . . it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application.” *Woratzeck*, 118 F.3d at 650.

In evaluating the prima facie case, the facts supporting a petitioner’s claim are presumed to be true. *See, e.g., In re Boshears*, 110 F.3d 1538 (11th Cir. 1997). Where a petitioner succeeds in establishing a prima facie showing as to one of the claims, he or she is entitled to proceed upon the entire application in the district court. *See* 28 U.S.C. § 2244 (b)(4); *Nevius v. McDaniel*, 104 F.3d 1120, 1121 (9th Cir. 1996) (“[t]he proper procedure under the [AEDPA] is for this court to authorize the filing of the entire successive application” upon a showing that one claim meets the requirements of Section 2244).

A petitioner may satisfy the due diligence prong of the standard by showing “some good reason why he or she was unable to discover the facts

supporting the motion” in time to litigate the claim during the first habeas petition. *In re Boshears*, 110 F.3d 1538 (11th Cir. 1997); *see also Felker v. Turpin*, 101 F.3d 657, 662 (11th Cir.), *cert. denied*, 519 U.S. 989 (1996) (application denied for failure to demonstrate that means of discovering facts did not become available until after denial of first habeas petition).

The second prong of the standard is satisfied if the facts underlying the claim establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found petitioner guilty of the underlying offense. *In re Boshears*, 110 F.3d at 1541; *see also United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000) (“a reasonable fact finder could have found that [petitioner] was, at a minimum, subject to aider and abettor liability”).

As demonstrated below, the verified allegations in the proposed petition for writ of habeas corpus establish “a sufficient showing of possible merit to warrant a further exploration by the district court” as to Mr. Morales’s due diligence in discovering and presenting the claim of substantial constitutional violations, as well as the unquestionable existence of clear and convincing evidence that absent these violations, no reasonable juror would have convicted Mr. Morales of capital murder.



**C. Claims Presented by A Petitioner Who Has Made A Sufficient Showing Of Actual Innocence May Not be Barred by The Due Diligence Requirement in Section 2244(b).**

The requirements of 28 U.S.C. Section 2244(b)(2) for authorizing the district court to file a second or successive habeas corpus application need not be satisfied when a petitioner is actually innocent of a capital crime. Actual innocence serves as a constitutionally mandated safety valve that protects an innocent person from execution, and allows for the vindication of constitutional violations that, but for their existence, the innocent person would not have been found guilty. *See Schlup v. Delo*, 513 U.S. 298 (1995); *Herrera v. Collins*, 506 U.S. 390 (1993); *McCleskey v. Zant*, 499 U.S. 467 (1991).

Any restrictions on second or successive habeas petitions that ignore actual innocence as a gateway to review denies Mr. Morales his right to be free of cruel and unusual punishment under the Eighth Amendment and Due Process of Law under the Fourteenth Amendment, and constitutes a suspension of the writ under Article I, Section 9, Clause 2 of the United States Constitution. The legitimate interest of the AEDPA in the prompt assertion of habeas claims and finality are not offended by permitting a habeas petition to be reviewed when the petitioner is innocent. As the Supreme Court recognized in *Schlup*:

The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the ‘fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.’ *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring); *see also* T. Starkie, *Evidence* 756 (1824) (“The maxim of the law is . . . that it is better that ninety-nine . . . offenders should escape, than that one innocent man should be condemned”); *see generally* Newman, *Beyond “Reasonable Doubt,”* 68 N.Y.U.L.Rev. 979, 980-981 (1993).

*Schlup*, 513 U.S. at 324-25 (footnote omitted).<sup>2</sup>

## **II. CLAIM ONE OF THE SUCCESSOR PETITION SATISFIES THE REQUIREMENTS OF SECTION 2244(b).**

The quintessential miscarriage of justice is the execution of a person who is entirely innocent, no matter how “due” the process might otherwise

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<sup>2</sup> Similarly, any purported failure of Mr. Morales to comply with California’s procedural rules does not bar review of the claims in the successor petition. This Court should consider the merits of Mr. Morales’s claims, despite any purported procedural default, because his claim of actual innocence is sufficient to bring him within the “narrow class of cases . . . implicating a fundamental miscarriage of justice.” *Schlup*, 513 U.S. at 315 (quoting *McCleskey*, 499 U.S. at 494). In order to have his claims heard on the merits, Mr. Morales need only show “that a court cannot have confidence in the outcome of the trial.” *Id.* at 316. The standard requires a showing that in light of all the evidence, including new evidence, “it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Id.* at 327. The court must consider all the evidence, including evidence illegally admitted, wrongly excluded, or that has become available after the trial. *Id.* at 327-28.

be. *Schlup*, 513 U.S. at 324-25. The resulting fundamental injustice that would result from an execution under such circumstances would be intolerable. The threshold of a substantive claim of actual innocence requires a truly persuasive showing of innocence. *Herrera*, 506 U.S. at 417; *see also Schlup*, 513 U.S. at 315-16. The assertion of a free-standing actual innocence claim requires a petitioner to make a showing that “must go beyond demonstrating doubt about his guilt, and must affirmatively prove that he is probably innocent.” *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (citing *Herrera*, 506 U.S. at 442-44 (Blackman, J., dissenting)).

This Court, however, also held in *Carriger v. Stewart*, 132 F.3d at 478-79, that where post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt, but not by affirmatively proving innocence, that can be enough to pass through the *Schlup* gateway to allow consideration of otherwise barred claims. The “new evidence” that may be considered in support of a claim of actual innocence under *Schlup*, 513 U.S. at 327, need be only newly presented rather than newly available. In *Schlup*, the Court specifically stated that a claim of actual innocence requires the introduction of “new reliable evidence--whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence--that was not presented at trial.” *Id.* at 324; *Sistrunk v.*

*Armenakis*, 292 F. 3d 669, 673 (9th Cir. 2002).

Claim One of the petition alleges, on the basis of newly presented and newly discovered evidence, that the State's fraudulent presentation of false evidence arbitrarily deprived Mr. Morales of his constitutional and statutory rights to an informed, fair and reliable ruling on his automatic motion for modification of the death verdict, pursuant to California Penal Code subsection 190.4(e). The new evidence, including the unequivocal assessment by the trial judge, demonstrates that had the informant Bruce Samuelson's perjury been revealed at trial, Judge McGrath would have found the prosecution's evidence insufficient to prove the lying-in-wait special circumstance allegation that establishes Mr. Morales's death eligibility and, thus, necessarily inadequate to support the death judgment. Exhibit 1 at 2-3.

Automatic review of death verdicts by the trial judge pursuant to subsection 190.4(e) is mandatory, as is the trial court's concomitant duty to undertake an independent review and re-weighing of the evidence, including an assessment of witness credibility. *See People v. Rodriguez*, 42 Cal. 3d 730 (1986). The provisions of subsection 190.4(e) are an integral part of the California's capital sentencing scheme, and were intended to meet federal constitutional requirements for meaningful appellate review. *Id.*

The State's substantial interference with the reliable adjudication of Mr. Morales's automatic, statutory motion frustrated mandatory provisions of state law and deprived Mr. Morales of a state created liberty interest without due process of law. "A state statute may create a constitutionally protected liberty interest if it contains explicit mandatory language creating a right." *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983); *see also Board of Pardons v. Allen*, 482 U.S. 369, 373 (1987) (use of mandatory language creates liberty interest in being granted parole); *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980); *Greenholtz v. Inmates of Nebraska Penal*, 442 U.S. 1, 7, 11-12 (1979) (same); *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002) (California parole scheme used mandatory language creating liberty interest).

The United States Constitution also guarantees Mr. Morales the right to "adequate, effective and meaningful" access to established adjudicatory procedures. *Bounds v. Smith*, 430 U.S. 817, 821 (1977); *see also Lewis v. Casey*, 518 U.S. 343, 354 (1996); *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971); *Taylor v. Delatoore*, 281 F.3d 844, 848 (9th Cir. 2002). Again, this right was frustrated and denied by the State's fatal contamination of the evidence considered and weighed by the trial judge in reviewing the verdict.

### **III. CLAIM TWO OF THE SUCCESSOR PETITION SATISFIES THE REQUIREMENTS OF SECTION 2244(b).**

The uncontroverted fact that effective impeachment of Samuelson's testimony would have vitiated any sufficient proof of the lying-in-wait special circumstance also demonstrates that the allegations and supporting evidence in Claim Two of the petition satisfy the requirements of section 2244(b) by showing Mr. Morales's innocence of any death-eligible offense. *See Thompson v. Calderon*, 151 F. 3d 918, 923-924 (9th Cir.) (*en banc*), *cert. denied*, 524 U.S. 965 (1998). Claim Two establishes that the prosecution intentionally presented Samuelson's false and misleading testimony regarding the nature and extent of the benefits he received in exchange for his cooperation with authorities; intentionally failed to correct misleading impressions created by Samuelson's testimony in that regard on cross-examination; and intentionally exploited and exacerbated the falsehoods in closing argument.

Particularly where the State relies on the testimony of "criminals who are rewarded by the government for their testimony," it has an "obligation to disclose material information to protect the defendant from being a victim of a perfidious bargain between the state and its witness." *Carriger v. Stewart*, 132 F.3d at 479. At a minimum, "the state is obligated to disclose "all

material information casting a shadow on a government witness's credibility.””” *Benn v. Lambert*, 283 F. 3d 1040, 1058-59 (9th Cir. 2002) (quoting *Carriger v. Stewart*, 132 F. 3d at 481-82; internal cites omitted). Here, as in *Benn v. Lambert*, “[t]he undisclosed benefits that [Samuelson] received added significantly to the benefits that were disclosed and certainly would have ‘cast a shadow’ on [his] credibility. Thus, their suppression was material.” *Id.* at 1059.

In addition to the materially false and misleading testimony and prosecutorial argument that the state had promised only to “recommend” a lenient disposition of Samuelson’s new felony charges, the prosecutor allowed Samuelson to mislead defense counsel, the jury and Judge McGrath to believe Samuelson had not nailed down guarantees on his pending felony probation violation. The prosecutor allowed Samuelson to compound his misleading testimony by suggesting that even if the felony probation violation had not been part of a package disposition as a reward for his testimony, he “doubt[ed] . . . very seriously” that he was exposed to a prison sentence in the matter. RT 2372. In fact, being the serial felon he was, Samuelson knew full well that – as his probation officer has observed – there was “no doubt that without the plea bargain, such a repeated offender would have been sentenced to prison.” Exhibit 6, Declaration of Vickie Wetherell,

at 6.

If the state had complied with its minimum obligation to disclose the truth about Samuelson's deals and to correct his false testimony to the contrary, the evidence would have cast an ever-darkening shadow across his credibility and, as we know from Judge McGrath's assessment, the evidence would have been regarded by any reasonable juror as insufficient to convict him of capital murder.

#### **IV. CLAIM THREE OF THE SUCCESSOR PETITION SATISFIES THE REQUIREMENTS OF SECTION 2244(b).**

Claim Three of the petition satisfies the requirements of Section 2244(b) because Samuelson's testimony – the indispensable proof of the special circumstance allegation – was inadmissible as the product of police agent interrogation in violation of *United States v. Massiah*, 377 U.S. 201 (1964). New evidence, including recently discovered evidence, conclusively demonstrates that Samuelson was rewarded with preferential housing and other treatment to allow him to get within close proximity of Mr. Morales for the purpose of eliciting incriminating information. The scheme did not achieve its first priority of obtaining incriminating statements from Mr. Morales. Nevertheless, it enabled Samuelson to be in close physical proximity to Mr. Morales and thereby gain access to his legal paperwork



while establishing a plausible pattern of access to Mr. Morales, which Samuelson and the prosecution exploited to give false credibility to Samuelson's claim that Mr. Morales actually made incriminating statements.

**V. CLAIM FOUR OF THE SUCCESSOR PETITION SATISFIES  
THE REQUIREMENTS OF SECTION 2244(B).**

Claim Four of the petition is a stand-alone claim of actual innocence. As noted above, Mr. Morales must make a showing that is "truly persuasive," *Herrera v. Collins*, 506 U.S. at 417; *Carriger v. Stewart*, 132 F. 3d at 476, and he can readily do so. First, Mr. Morales "accompanies his claim of innocence with an assertion constitutional error at trial" and thus "need carry less of a burden" than one attempting to overcome a conviction and sentence in a trial that was "error-free." *Schlup v. Delo*, 513 U.S. at 315-17.

Second, because the cluster of constitutional errors in Mr. Morales's case essentially invalidate the evidentiary predicate for the special circumstance allegation, his showing of innocence is far stronger than demonstrating that "but for constitutional error, no reasonable juror *would* have found the petitioner eligible for the death penalty under the applicable state law.'" *Babbitt v. Woodford*, 177 F.3d 744, 746 (9th Cir.), *cert. denied*, 526 U.S. 1107 (1999) (quoting *Thompson v. Calderon*, 151 F. 3d at 923)

(emphasis added). Rather, Mr. Morales can show that no reasonable juror *could* have found him eligible for the death penalty under the applicable law. Thus, Mr. Morales can satisfy the far more stringent standard in *Jackson v. Virginia*, 443 U.S. 307 (1979), measuring the sufficiency of evidence to support a verdict.

Moreover, Mr. Morales is prepared to rely on affirmative evidence of his innocence as well. From the earliest stages of the case, Mr. Morales has acknowledged his involvement in and responsibility for the homicide in this case. The depth and sincerity of his acceptance of blame and expression of remorse was regarded as a factor in mitigation at sentencing by the trial judge, who nevertheless felt compelled by the weight of the evidence as it then appeared to sentence Mr. Morales to death. RT 3194. For 25 years, Mr. Morales has fully confessed his behavior and mourned the tragic consequences of that behavior. But, the behavior that Mr. Morales fully admits did not extend to a pre-existing, premeditated intent to commit murder while lying in wait. That aspect of the case – the critical difference between a sentence of life in prison without possibility of parole and a sentence of death – is an invention of Bruce Samuelson; and like every other aspect of his testimony it is patently false.

## CONCLUSION

For the reasons sated herein, and in the accompanying Petition for a Writ of Habeas Corpus, petitioner requests a stay of his execution scheduled for February 21, 2006. Petitioner meets the requirements of *Barefoot v. Estelle*, 463 U.S. 880 (1983), in that there are substantial grounds on which relief might be granted and petitioner has shown a strong likelihood of relief on the merits. In addition, petitioner meets the requirement of 28 U.S.C. Section 2244(b) because the application herein should be approved and he be allowed to file his accompanying petition in the District Court.

Dated: February 17, 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David A. Senior", is written over a horizontal line.

David A. Senior  
Counsel of Record for Petitioner

**A**

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7 Attorneys for Petitioner Michael A. Morales

8  
9 UNITED STATES DISTRICT COURT  
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11 Michael Angelo Morales,

12 Petitioner,

13 v.

14 Steven Ornoski, Warden, San Quentin  
15 San Quentin State Prison,

16 Respondent

) **DEATH PENALTY CASE**

) Case No. \_\_\_\_\_

) Petition for Writ of Habeas Corpus by  
A Prisoner in State Custody

) **EXECUTION IMMINENT:**  
**February 21, 2006 at 12:01 a.m.**

17  
18 **I. INTRODUCTION**

19 For decades the courts have cautioned that “criminal informants are cut from  
20 untrustworthy cloth and must be managed and carefully watched by the government and  
21 the courts to prevent them from . . . manufacturing evidence against those under  
22 suspicion of crime, and from lying under oath in the courtroom.” *United States v.*  
23 *Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993); *accord, On Lee v. United States*, 343  
24 U.S. 747, 757 (1952) (noting that the use of informers, which are “dirty business” may  
25 raise “serious questions” of credibility; *Northern Mariana Islands v. Bowie*, 243 F.3d  
26 1109, 1123 (9th Cir. 2001) (criminal charged with a serious crime understands the way  
27 out of trouble is to “purchase leniency” by offering testimony in exchange). This is not  
28 the first time San Joaquin prosecutors have knowingly proceeded in capital cases in the

1 face of such dangers and, at times, in complete disregard for the truth. *Hayes v. Brown*,  
2 399 F.3d 972 (9th Cir. 2005) (granting new trial based on San Joaquin prosecutor's  
3 elicitation of false testimony from informant during 1981 capital trial); *Belmontes v.*  
4 *Brown*, 414 F.3d 1094, 1115 (9th Cir. 2005) (San Joaquin County prosecutor violated  
5 obligation to "correct false testimony" and disclose deal in 1982 capital trial).

6 What distinguishes Mr. Morales's case, however, is that the trial judge in his case  
7 has clearly and publicly stated that the testimony of such an informant — Bruce  
8 Samuelson — was not only the "cornerstone" of the prosecutor's case and  
9 "indispensable" to proving the lone constitutional special circumstance — but it was  
10 "instrumental" in convincing the judge at the time of trial that death was the only  
11 appropriate punishment. That judge has clearly stated now that had he known of the  
12 falsity of the testimony, he "would not have let the death sentence stand." He joins Mr.  
13 Morales in seeking to prevent the "grievous and freakish injustice" of allowing such a  
14 death sentence to stand and be carried out on February 21 at 12:01 a.m. Exhibit 1,  
15 Letter from the Honorable Charles R. McGrath, at 1-3.

16 Mr. Morales therefore petitions this Court to correct an obvious and terrible  
17 mistake that any fair-minded jurist recognizes must be corrected, but which has so far  
18 eluded judicial remedy, and hereby alleges the following grounds for the issuance of a  
19 writ of habeas corpus and the grant of relief:

## 20 II. PROCEDURAL HISTORY

21 A. Court Entering Judgment: Superior Court of Ventura County Case No. 17960,  
22 Ventura, California.

23 B. Date of Judgment: June 14, 1983.

24 C. Sentence: Death.

25 D. Nature of the Offenses: Special circumstance murder committed while lying in  
26 wait, California Penal Code sections 187, 190.2(a)(15), conspiracy to commit murder,  
27 California Penal Code section 182, and rape, California Penal Code section 261.2.

28 E. Petitioner pleaded not guilty and was tried by a jury. Petitioner did not testify at

1 trial, but did address the trial court during proceedings pursuant to California Penal  
2 Code section 190.4(e) (automatic motion to modify the death verdict).

3 F. Petitioner's automatic appeal was lodged in the California Supreme Court on June  
4 24, 1983 as California Supreme Court Case No. S004552.

5 1. On February 22, 1984, counsel was appointed to represent petitioner on  
6 this automatic appeal.

7 2. Petitioner's conviction and death sentence were affirmed by The  
8 California Supreme Court on April 6, 1989 and a petition for rehearing was denied on  
9 June 1, 1989. *People v. Morales*, 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64  
10 (1989)

11 3. The issues raised on the automatic appeal were:

12 a. The convictions must be reversed because the Ventura County  
13 process for the formation of jury pools deprived appellant of his right to a jury drawn  
14 from a representative cross section of the community;

15 b. The court erroneously instructed the jury that lying-in-wait within  
16 the meaning of Penal Code section 190.2 (a)(15) could be found if the defendant's  
17 purpose was concealed, even in the absence of actual or attempted physical concealment  
18 of the defendant's person;

19 c. Even if the instructions on lying-in-wait were correct, there is  
20 insufficient evidence that the murder was committed while the defendant was lying-in-  
21 wait or that the victim was taken unawares;

22 d. The Penal Code section 190.2(a)(15) finding must be reversed  
23 because the prosecution failed to establish the corpus delicti of the special circumstance;

24 e. The court erred in admitting evidence of out-of-court statements of  
25 co-defendant Ortega that petitioner would participate in a murder of Randy Blythe;

26 f. The court's failure to instruct that Penal Code section 190.2(a)(18)  
27 requires an intent to inflict pain mandates reversal of the torture murder special  
28 circumstance finding;

1           g.     The first degree murder conviction must be reversed because the jury  
2 improperly was instructed on lying-in-wait, because there is insufficient evidence to  
3 justify giving the lying-in-wait instructions, and because there is insufficient evidence to  
4 justify giving the torture murder instructions;

5           h.     The evidence fails to establish the corpus delicti of rape; the rape  
6 conviction must therefore be reversed;

7           i.     The rape conviction must be reversed because the court failed to  
8 instruct the jury that the testimony of Bruce Samuelson should be viewed with distrust  
9 because Samuelson was a criminal informant;

10          j.     The trial court's refusal to order sequestration of the jury during  
11 penalty phase deliberations upon request of the petitioner requires reversal of the  
12 penalty phase decision;

13          k.     The court's failure to admonish the jury at adjournment during  
14 penalty phase deliberations requires reversal of the penalty phase decision;

15          l.     The court's failure to instruct the jury that evidence of other crimes  
16 in aggravation must be proved beyond a reasonable doubt is reversible error;

17          m.     The court erred in admitting evidence of two convictions which were  
18 entered after the commission of the murder in this case;

19          n.     The court erred in instructing the jury that the mental or emotional  
20 disturbance in Penal Code section 190.3(d) and the duress in Penal Code section  
21 190.3(g) must be "extreme" in order to constitute a mitigating factor;

22          o.     The penalty decision must be reversed because the jury erroneously  
23 was allowed to consider the invalid torture special circumstance and the constitutionally  
24 irrelevant factor of the victim's subjective experience of pain as aggravating factors;

25          p.     The court's failure to instruct the jury at the penalty phase that it  
26 should view extrajudicial statements of petitioner with caution constitutes reversible  
27 error;

28          q.     The court erred in failing to reinstruct the jury that no adverse



1 inference should be drawn from petitioner's failure to testify and that evidence of his  
2 oral admission introduced at the guilt phase should be viewed with caution at the  
3 penalty phase;

4           r.     The penalty phase verdict must be reversed because of errors  
5 committed in the guilt phase pertaining to the extrajudicial statements of co-defendant  
6 Ortega and the extrajudicial statements of petitioner allegedly made to informant Bruce  
7 Samuelson;

8           s.     The prosecutor committed prejudicial misconduct in his penalty  
9 phase argument by repeated reference to petitioner's failure to express remorse;

10           t.     The prosecutor committed prejudicial misconduct in his penalty  
11 phase argument by his inflammatory demonstration of the use of the hammer; and

12           u.     The court relied on erroneous factors in aggravation and on  
13 inadmissible evidence, and failed to consider evidence in mitigation in denying  
14 petitioner's motion pursuant to Penal Code section 190.4(e)

15 G.     On August 28, 1989, petitioner filed a Petition for Writ of Certiorari in the United  
16 States Supreme Court. That petition was denied on November 27, 1989. *Morales v.*  
17 *California*, 493 U.S. 984, 110 S. Ct. 520, 107 L.Ed. 2d 520 (1989). The issues raised  
18 were:

19           1.     Petitioner's death sentence must be reversed because his accomplice's  
20 hearsay declaration of his and petitioner's intent to commit two murders, one by  
21 torture and lying-in-wait, was presented to the jury in violation of the confrontation  
22 clause;

23           2.     The court's failure to instruct on intent to inflict pain in connection with  
24 the torture special circumstance deprived petitioner of due process; and

25           3.     California's lying-in-wait special circumstance violates the Eighth  
26 Amendment because it permits imposition of the death penalty where the defendant  
27 merely conceals his purpose instead of requiring physical concealment.

28 H.     On April 24, 1991 the United States District Court for the Central District of

1 California appointed counsel to represent petitioner in proceedings brought pursuant to  
2 28 U.S.C. § 2254.

3 1. On July 20, 1992, petitioner filed a Petition for Writ of Habeas Corpus in  
4 that court, alleging fifty-two claims for relief.

5 2. The court determined twenty of these claims had been exhausted during  
6 petitioner's automatic appeal.

7 3. On November 16, 1992, the court dismissed the thirty-two unexhausted  
8 claims without prejudice and ordered petitioner to exhaust the claims in the California  
9 Supreme Court.

10 I. On December 16, 1992, petitioner, through federally-appointed counsel, filed a  
11 Petition for Writ of Habeas Corpus in the California Supreme Court. *In re Michael A.*  
12 *Morales*, Case No. S030276.

13 1. On March 10, 1993 the Court granted appellate counsel John Duree, Jr.'s  
14 motion to withdraw and appointed David A. Senior, Esq. to represent petitioner in  
15 "appropriate post-conviction proceedings in this court."

16 2. On July 28, 1993, this petition was denied "on the merits and as  
17 untimely," without issuance of an order to show cause or an evidentiary hearing.

18 3. The issues raised were:

19 a. Petitioner's counsel rendered ineffective assistance of counsel at the  
20 guilt and penalty phases of trial in violation of petitioner's rights under the state and  
21 federal constitutions when he unreasonably failed to present sufficient statistical  
22 evidence to make a prima facie showing of systematic exclusion of Hispanics from the  
23 jury venire to petitioner's substantial prejudice;

24 b. Petitioner's counsel rendered ineffective assistance of counsel at the  
25 guilt and penalty phases of trial in violation of petitioner's rights under the state and  
26 federal constitutions when he unreasonably failed during voir dire to investigate  
27 adequately the ideas, philosophies, backgrounds, experiences, knowledge, demeanor,  
28 beliefs, and attitudes of the prospective jurors in petitioner's jury venires to petitioner's

1 substantial prejudice;

2 c. Petitioner's sentence has been arbitrarily and capriciously imposed in  
3 violation of petitioner's rights under the state and federal constitutions in that the capital  
4 charge against petitioner was an aberration from the typical non-capital disposition  
5 reached in the vast majority of similar cases in San Joaquin County since the  
6 reenactment of the death penalty in 1977;

7 d. Petitioner's counsel rendered ineffective assistance of counsel at the  
8 guilt and penalty phases of trial in violation of petitioner's rights under the state and  
9 federal constitutions when he unreasonably failed to object to and/or challenge the  
10 arbitrary, capricious, and racially motivated capital charges against petitioner by the San  
11 Joaquin County District Attorney to petitioner's substantial prejudice;

12 e. Petitioner's counsel rendered ineffective assistance of counsel at the  
13 guilt phase of trial in violation of petitioner's rights under the state and federal  
14 constitutions when he unreasonably failed to investigate adequately and present facts  
15 regarding petitioner's prolonged use of phencyclidine supporting a legal defense to the  
16 crimes to petitioner's substantial prejudice;

17 f. Petitioner's counsel rendered ineffective assistance of counsel at the  
18 penalty phase of trial in violation of petitioner's rights under the state and federal  
19 constitutions when he unreasonably failed to investigate adequately and present facts  
20 regarding petitioner's phencyclidine use as mitigation for the crimes of which he was  
21 convicted;

22 g. Petitioner's counsel rendered ineffective assistance of counsel at the  
23 guilt phase of trial in violation of petitioner's rights under the state and federal  
24 constitutions when he unreasonably failed to investigate adequately and present facts  
25 regarding petitioner's alcohol intoxication at the time of the offense supporting a legal  
26 defense to the crimes to petitioner's substantial prejudice;

27 h. Petitioner's counsel rendered ineffective assistance of counsel at the  
28 penalty phase in violation of petitioner's rights under the state and federal constitutions

1 when he unreasonably failed to investigate adequately and present facts regarding  
2 petitioner's alcohol intoxication at the time of the offense as mitigation for the crimes of  
3 which he was convicted;

4 i. Petitioner's counsel rendered ineffective assistance of counsel at the  
5 guilt and penalty phases in violation of petitioner's rights under the state and federal  
6 constitutions when he unreasonably failed to investigate adequately and present facts of  
7 petitioner's commingling phencyclidine and alcohol in support of a legal defense to the  
8 crimes, and/or as mitigation for the crimes, to petitioner's substantial prejudice;

9 j. Petitioner's counsel rendered ineffective assistance of counsel at the  
10 guilt phase of trial in violation of petitioner's rights under the state and federal  
11 constitutions when he unreasonably failed to investigate, learn, and present an alibi  
12 defense to the crimes to petitioner's substantial prejudice;

13 k. Petitioner's counsel rendered ineffective assistance of counsel at the  
14 guilt phase in violation of petitioner's rights under the state and federal constitutions  
15 when he failed to investigate and present facts and expert testimony supporting a  
16 defense to the crime of rape to petitioner's substantial prejudice;

17 l. Petitioner's counsel rendered ineffective assistance of counsel at the  
18 guilt phase in violation of petitioner's rights under the state and federal constitutions  
19 when he unreasonably failed to investigate and present forensic evidence supporting a  
20 defense to the crimes to petitioner's substantial prejudice;

21 m. Petitioner's counsel rendered ineffective assistance of counsel at the  
22 guilt phase in violation of petitioner's rights under the state and federal constitutions  
23 when he unreasonably failed to investigate, challenge, and/or impeach the tangible  
24 evidence presented by the prosecution which would have supported a defense to the  
25 crimes to petitioner's substantial prejudice;

26 n. Petitioner's counsel rendered ineffective assistance of counsel at the  
27 guilt phase of trial in violation of petitioner's rights under the state and federal  
28 constitutions when, without the consent of petitioner, he unreasonably made concessions

1 regarding the prosecution's burden of proof with respect to elements of the crime of  
2 murder, as well as the meaning of certain evidence presented by the prosecution to  
3 petitioner's substantial prejudice;

4 o. Petitioner's counsel rendered ineffective assistance of counsel at the  
5 guilt and penalty phases of trial in violation of petitioner's rights under the state and  
6 federal constitutions when he unreasonably failed to address and argue the evidence  
7 which was favorable to petitioner during his closing argument to petitioner's substantial  
8 prejudice;

9 p. Petitioner's rights under the state and federal constitutions were  
10 violated by the combined actions of the prosecutor and the prosecution's star criminal  
11 informant witness in failing to disclose, *inter alia*, the substantial benefits conferred on  
12 the witness and the arrangement through which the witness' expectation of the  
13 substantial benefits was created;

14 q. Petitioner's rights under the state and federal constitutions were  
15 violated by the prosecution's knowing use of false testimony by the prosecution's star  
16 criminal informant witness to petitioner's substantial prejudice;

17 r. Petitioner's rights under the state and federal constitutions were  
18 violated by the prosecution's use of the star criminal informant witness as a government  
19 agent to elicit a confession from petitioner after his arrest to the prejudice of petitioner;

20 s. Petitioner's counsel rendered ineffective assistance of counsel in  
21 violation of petitioner's rights under the state and federal constitutions when he  
22 unreasonably failed to investigate and present facts to impeach the false testimony of the  
23 prosecution's star criminal informant witness, and failed to request an instruction that  
24 the testimony of a criminal informant should be viewed with distrust, to petitioner's  
25 substantial prejudice;

26 t. Petitioner's rights under the state and federal constitutions were  
27 violated by the combined actions of the prosecutor and the prosecution's star witness in  
28 failing to disclose, *inter alia*, the substantial benefits conferred on the witness and the

1 arrangement through which the witness' expectation of the substantial benefits was  
2 created;

3 u. Petitioner's rights under the state and federal constitutions were  
4 violated by the prosecution's knowing use of false testimony by Pat Flores, one of the  
5 prosecution's star witnesses, to petitioner's substantial prejudice;

6 v. Petitioner's rights under the state and federal constitutions were  
7 violated by the prosecution's knowing use of false testimony by Raquel Cardenas, one  
8 of the prosecution's star witnesses, to petitioner's substantial prejudice;

9 w. Petitioner's counsel rendered ineffective assistance of counsel in  
10 violation of petitioner's rights under the state and federal constitutions when he  
11 unreasonably failed to investigate and present facts to impeach the false testimony of the  
12 prosecution's star witnesses, Pat Flores and Raquel Cardenas, to petitioner's substantial  
13 prejudice;

14 x. Petitioner's counsel rendered ineffective assistance of counsel at the  
15 guilt phase of trial in violation of petitioner's rights under the state and federal  
16 constitutions when he unreasonably failed to adequately investigate, learn, and present  
17 to the court the law regarding the torture special circumstance to petitioner's substantial  
18 prejudice;

19 y. Petitioner's counsel rendered ineffective assistance of counsel at the  
20 guilt phase of trial in violation of petitioner's rights under the state and federal  
21 constitutions when he failed to investigate and present facts and expert testimony  
22 supporting a defense to the first-degree murder torture theory and the torture special  
23 circumstance to petitioner's substantial prejudice;

24 z. Petitioner's counsel rendered ineffective assistance of counsel at the  
25 guilt phase of trial in violation of petitioner's rights under the state and federal  
26 constitutions when he unreasonably failed to investigate and present facts supporting a  
27 legal defense to the lying-in-wait first-degree murder theory to petitioner's substantial  
28 prejudice;

1           aa.    Petitioner's counsel rendered ineffective assistance of counsel at the  
2 penalty phase of trial in violation of petitioner's rights under the state and federal  
3 constitutions when he unreasonably failed to investigate adequately and present facts  
4 regarding petitioner's mental health background as mitigation for the crimes of which he  
5 was convicted to petitioner's substantial prejudice;

6           bb.    Petitioner's counsel rendered ineffective assistance of counsel at the  
7 penalty phase of trial in violation of petitioner's rights under the state and federal  
8 constitutions when he unreasonably failed to adequately investigate and present facts  
9 supporting mitigation for the crimes of which he was convicted;

10          cc.    Petitioner's counsel rendered ineffective assistance of counsel at the  
11 penalty phase of trial in violation of petitioner's rights under the state and federal  
12 constitutions when he unreasonably failed to provide information to, communicate with,  
13 prepare, and/or request expert analysis from, petitioner's mental health expert with  
14 respect to the mitigation issues for the crimes of which petitioner was convicted;

15          dd.    Petitioner's counsel rendered ineffective assistance of counsel at the  
16 penalty phase of trial in violation of petitioner's rights under the state and federal  
17 constitutions when he unreasonably failed to investigate, learn, and/or present to the  
18 court the law regarding the admissibility of evidence of other crimes allegedly  
19 committed by petitioner;

20          ee.    Petitioner's counsel rendered ineffective assistance of counsel at the  
21 penalty phase of trial in violation of petitioner's rights under the state and federal  
22 constitutions when he unreasonably failed to object to the prosecutor's prejudicial  
23 remarks to petitioner's substantial prejudice;

24          ff.    The first-degree murder conviction violates petitioner's rights under  
25 the state and federal constitutions because the jury improperly was instructed on lying-  
26 in-wait, there was insufficient evidence to justify giving the lying-in-wait instructions,  
27 there was insufficient evidence to justify the torture murder theory, and the request for a  
28 special finding on the premeditation and deliberation issue was improper; and

1           gg. Petitioner's counsel rendered ineffective assistance of counsel at the  
2 guilt and penalty phases of trial in violation of petitioner's rights under the state and  
3 federal constitutions because counsel was unprepared, inexperienced, and lacked the  
4 requisite ability to provide a reasonably adequate defense for petitioner with respect to  
5 the crimes of which he was convicted to petitioner's substantial prejudice.

6 J. On April 21, 1993, the California Supreme Court filed petitioner's previously  
7 lodged Supplemental Petition to his initial habeas corpus petition as a new petition. *In*  
8 *re Michael A. Morales*, Case No. S032386.

9           1. The court denied this petition "on the merits and as untimely" on July 28,  
10 1993, without seeking a response from the government, without issuing an order to  
11 show cause, and without an evidentiary hearing.

12           2. The issues raised were:

13           a. Petitioner's rights under the state and federal constitutions were  
14 violated by the combined actions of the prosecutor and the prosecution's pathologist in  
15 failing to disclose, inter alia, prior inconsistent sworn testimony of the pathologist at a  
16 capital murder trial;

17           b. Petitioner's rights under the state and federal constitutions were  
18 violated by the prosecution's knowing use of false testimony by the prosecution's  
19 pathologist to petitioner's substantial prejudice; and

20           c. Petitioner's counsel rendered ineffective assistance of counsel at the  
21 guilt phase of trial in violation of petitioner's rights under the state and federal  
22 constitutions when he unreasonably failed to adequately investigate and present facts to  
23 impeach the false testimony of the prosecution's pathologist to petitioner's substantial  
24 prejudice.

25 K. On January 14, 1994, petitioner filed his Amended Petition for Writ of Habeas  
26 Corpus in the United States District Court for the Central District of California, alleging  
27 the following grounds for relief:

28           1. Underrepresentation of Hispanics on the Jury Venire;



- 1           2.     Ineffective Assistance of Counsel at Guilt and Penalty Phases Resulting
- 2 from Improper Challenge of Underrepresentation of Hispanics on the Jury Venire;
- 3           3.     Ineffective Assistance of Counsel at Guilt and Penalty Phases Resulting
- 4 from Improper Voir Dire;
- 5           4.     Ineffective Assistance of Counsel at Guilt and Penalty Phases Resulting
- 6 From Failure to Challenge Unconstitutional, Discriminatory Charging Practices;
- 7           5.     Ineffective Assistance of Counsel at Guilt Phase Regarding PCP Use;
- 8           6.     Ineffective Assistance of Counsel at Penalty Phase Regarding PCP Use;
- 9           7.     Ineffective Assistance of Counsel at Guilt Phase Regarding Alcohol
- 10 Intoxication;
- 11           8.     Ineffective Assistance of Counsel at Penalty Phase Regarding Alcohol
- 12 Intoxication;
- 13           9.     Ineffective Assistance of Counsel at Guilt and Penalty Phases Regarding
- 14 Concurrent Effects of PCP Use and Alcohol Intoxication;
- 15           10.    Ineffective Assistance of Counsel at the Guilt Phase;
- 16           11.    Ineffective Assistance of Counsel Regarding Defense to Rape Charge;
- 17           12.    Ineffective Assistance of Counsel at the Guilt Phase Regarding Forensic
- 18 and Pathologic Evidence;
- 19           13.    Ineffective Assistance of Counsel at the Guilt Phase Regarding Tangible
- 20 Evidence;
- 21           14.    Ineffective Assistance of Counsel at Guilt Phase During Closing
- 22 Argument (Improper Conduct);
- 23           15.    Ineffective Assistance of Counsel at the Guilt Phase and Penalty Phase
- 24 During Closing Argument (Failure to Address Evidence);
- 25           16.    Failure to Disclose Material Evidence (Samuelson);
- 26           17.    Continued Knowing Use of False Testimony by Prosecution (Samuelson);
- 27           18.    Continued Improper Use of Government Agent;
- 28           19.    Ineffective Assistance of Counsel Regarding Informant Testimony;

- 1           20.    Failure to Disclose Material Evidence (Flores);
- 2           21.    Knowing Use of False Testimony by Prosecution (Flores);
- 3           22.    Knowing Use of False Testimony by Prosecution (Cardenas);
- 4           23.    Ineffective Assistance of Counsel Regarding Testimony of Flores and
- 5 Cardenas;
- 6           24.    Insufficient Evidence to Support a Finding of Torture Murder or the
- 7 Torture Special Circumstance;
- 8           25.    Ineffective Assistance of Counsel at the Guilt Phase Regarding Torture
- 9 Special Circumstance;
- 10          26.    Improper Instruction on Torture Murder Special Circumstance;
- 11          27.    Ineffective Assistance of Counsel at the Guilt Phase Regarding Pathologic
- 12 and Forensic Evidence Pertaining to Torture Murder Theory and Torture Special
- 13 Circumstance;
- 14          28.    The Torture Special Circumstance and the Victim's Pain Were
- 15 Improperly Considered by the Jury as Aggravating Factors;
- 16          29.    Unconstitutional Jury Instruction on Lying-in-Wait;
- 17          30.    Insufficient Evidence to Support Finding of Lying-in-Wait;
- 18          31.    The Corpus Delicti of the Special Circumstance of Lying-in-Wait Was
- 19 Not Established;
- 20          32.    Ineffective Assistance of Counsel at Guilt Phase Regarding Lying-in-Wait
- 21 Murder Theory and Special Circumstance;
- 22          33.    Ineffective Assistance of Counsel at Penalty Phase Regarding Mental
- 23 Health Evaluation;
- 24          34.    Ineffective Assistance of Counsel at Penalty Phase Regarding Suicide
- 25 Prevention;
- 26          35.    Ineffective Assistance of Counsel at Penalty Phase Regarding Use of
- 27 Mental Health Expert;
- 28          36.    Improper Admission of Out-of-Court Statements of Severed Co-defendant

1 Ortega;

2 37. Improper Consideration by Jury of the Extrajudicial Statements of Ortega  
3 and Petitioner;

4 38. Failure to Establish the Corpus Delicti of Rape;

5 39. Failure to Admonish Jury at Adjournment During Penalty Phase  
6 Deliberations;

7 40. Failure to Sequester the Jury;

8 41. Failure to Instruct Regarding Evidence of Other Crimes;

9 42. Improper Admission Into Evidence of Two Convictions Entered  
10 Subsequent to the Commission of the Murder;

11 43. Ineffective Assistance of Counsel at the Penalty Phase Regarding  
12 Evidence of Other Crimes;

13 44. Improper Jury Instruction on Emotional Disturbance and Duress;

14 45. Failure to Instruct the Jury at the Penalty Phase that it Should View  
15 Extrajudicial Statements of Petitioner with Caution;

16 46. Failure to Reinstruct During Penalty Phase Regarding Petitioner's Failure  
17 to Testify;

18 47. Prosecutor's Prejudicial Remarks Regarding Lack of Remorse;

19 48. Ineffective Assistance of Counsel Regarding Prosecutor's Prejudicial  
20 Remarks Regarding Lack of Remorse;

21 49. Prosecutorial Misconduct in the Penalty Phase Argument;

22 50. Improper Review of Death Penalty Verdict by the Court;

23 51. The First Degree Murder Conviction is Unconstitutional; and

24 52. Ineffective Assistance of Counsel at Guilt and Penalty Phases.

25 L. On April 11, 1994, respondent moved to dismiss the amended petition on grounds  
26 of procedural default. The district court granted the motion and, on April 29, 1994,  
27 entered an order dismissing all extra-record habeas corpus claims on procedural  
28 grounds, with prejudice. On June 4, 1996, the Ninth Circuit Court of Appeals reversed

1 the district court on interlocutory appeal and remanded the case for consideration of the  
2 extra-record habeas corpus claims on the merits. *Morales v. Calderon*, 85 F.3d 1387  
3 (9th Cir. 1996).

4 M. On remand, this Court denied petitioner relief in a series of partial summary  
5 judgment orders, the last of which was entered on April 19, 1999. Petitioner filed a  
6 motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure  
7 59(e) on May 5, 1999, and an order denying the motion was entered by the district court  
8 on June 15, 1999.

9 N. A timely Notice of Appeal was filed on July 9, 1999. This Court issued a  
10 Certificate of Probable Cause on July 12, 1999 granting petitioner an appeal.

11 1. On December 20, 1999, petitioner filed a brief presenting the following  
12 grounds for relief:

13 a. Improper Jury Instruction on the Torture Special Circumstance  
14 Mandates that it be Vacated;

15 b. Counsel Rendered Ineffective Assistance Regarding the Torture  
16 Special Circumstance;

17 c. The Lying in Wait Special Circumstance is Unconstitutional Under  
18 the Eighth Amendment;

19 d. The Prosecution's Knowing Use of False Testimony Violated  
20 Petitioner's Fourteenth Amendment Rights;

21 e. Petitioner's Sixth Amendment Rights Were Violated by the  
22 Government's Use of a Jailhouse Informant to Interrogate Petitioner;

23 f. Undisclosed Prosecutorial Favors and Presentation of False Evidence  
24 Violated Petitioner's Fourteenth Amendment Rights;

25 g. Ortega's Hearsay Statement Violated the Confrontation Clause of the  
26 Sixth Amendment;

27 h. Counsel Rendered Ineffective Assistance in Violation of Petitioner's  
28 Sixth Amendment Right to Counsel;

1 i. The Under-Representation of Hispanics on the Jury Venire Violated  
2 Petitioner's Sixth Amendment Rights; and

3 j. San Joaquin County Employed Discriminatory and Capricious  
4 Capital Charging Practices.

5 2. On July 28, 2003, a three-judge panel of the Ninth Circuit Court of  
6 Appeal refused to certify for appeal five of petitioner's ten claims, and denied the other  
7 five on the merits. *Morales v. Woodford*, 336 F.3d 1136 (9th Cir. 2003). On October  
8 10, 2003, petitioner requested hearing or rehearing of his claims by the circuit court en  
9 banc. The panel's opinion was modified on October 21, 2004, after Judge McKeown  
10 modified her previous ruling and entered a partial concurrence and partial dissent. On  
11 March 1, 2005, petitioner's request for rehearing en banc was denied.

12 O. On June 29, 2005, petitioner filed a Petition for a Writ of Certiorari in the  
13 Supreme Court of the United States. The Supreme Court denied certiorari on October  
14 11, 2005. *Morales v. Brown*, 126 S. Ct. 420 (U.S. 2005). The petition on October 11,  
15 raised the following grounds for relief:

16 1. The Court of Appeals Violated Its Obligations Under Section 2254 and  
17 *Miller-El* When It Summarily Refused to Certify Morales's Challenge to the State's  
18 Use of Samuelson's False Testimony, Even Though the Federal Courts of Appeals  
19 Disagree as to the Standard Governing the Merits of that Claim, and Morales Made a  
20 "Substantial Showing" that his Constitutional Rights Were Violated Under the Law of  
21 Two Circuits;

22 2. California's Lying-in-Wait Special Circumstance Violates the Eighth  
23 Amendment Because It Does Not Genuinely Narrow the Class of Persons Eligible for  
24 the Death Penalty;

25 3. The Court Should Grant Certiorari to Resolve the Circuit Split Regarding  
26 the Proper Level of Review to Be Applied By a Federal Court When State Courts Fail  
27 to Conduct Adequate *Chapman* or *Clemons* Review of Constitutional Error; and

28 4. The Court Should Grant Certiorari To Resolve Whether, When a Federal

1 Court of Appeals Holds That a State Court Has Failed to Conduct Constitutionally  
2 Adequate *Chapman* or *Clemons* Analysis, It Should Remand to the State Court to  
3 Remedy the Error or Conduct Its Own Harmless Error Review.

4 P. On February 10, 2006, petitioner filed a Petition for Writ of Habeas Corpus  
5 and/or Petition for Writ of Error Coram Vobis in the California Supreme Court. *In re*  
6 *Michael A. Morales*, Case No. S141074.

7 1. On February 15, 2006, the Court denied the petition, ruling in relevant  
8 part that "Claims 1 through 5 are denied on the merits. In addition, each claim also is  
9 barred as untimely," citing only *In re Robbins* 18 Cal. 4th 770, 780-81 (1998).

10 2. The issues raised were:

11 a. Mr. Morales's judgment of death is unconstitutional because it was  
12 the product of fraud, mistake, and misrepresentation;

13 b. The prosecutor committed multiple acts of misconduct in violation  
14 of Mr. Morales's constitutional rights in the presentation of Bruce Samuelson's  
15 testimony;

16 c. The admission of Bruce Samuelson's testimony violated the  
17 constitution because he was an unlawful police agent;

18 d. The prosecution violated Mr. Morales's constitutional rights by  
19 coercing, threatening, bribing, and fraudulently obtaining and subsequently insulating  
20 fabricated and incriminating testimony from witnesses Pat Flores and Raquel Cardenas;  
21 and

22 e. Mr. Morales is innocent of capital murder.

23 Q. All grounds presented herein were presented to the California Supreme Court.

24 R. There are no other petitions currently pending in any court attacking the judgment  
25 at issue herein and none has previously been filed except for those set forth above.

26 S. From arraignment in the state municipal court through sentencing in Ventura  
27 County Superior petitioner was represented by Craig Holmes. Mr. Holmes is now  
28 second in command in the San Joaquin County District Attorney's Office, the agency

1 that prosecuted petitioner.

2 T. On automatic appeal in state court, from February 22, 1984, until March 10,  
3 1993, petitioner was represented by John Duree, Jr.

4 U. In all federal court proceedings, beginning with his appointment on April 24,  
5 1991, David A Senior, Esq. has represented petitioner. The California Supreme Court  
6 appointed him on March 10, 1993 to represent petitioner in all appropriate post-  
7 conviction proceedings in that court. On January 9, 2006, the California Supreme Court  
8 appointed David A. Senior, Esq. to represent petitioner in executive clemency  
9 proceedings.

### 10 III. CLAIMS FOR RELIEF

#### 11 A. Claim One: Mr. Morales Was Denied His Constitutional Right to the Trial 12 Court's Independent Judgment of the Appropriateness of His Death Sentence 13 Because of Fraud, Deceit, and Misrepresentation.

14 The trial judge's considered evaluation of the evidence before him led him to  
15 deny Mr. Morales's automatic motion, pursuant to California Penal Code section  
16 190.4(e), to modify the death verdict to one of life in prison without parole. In  
17 particular, the judge -- the Honorable Charles R. McGrath -- was impressed by jailhouse  
18 informant Bruce Samuelson's recitation of Mr. Morales's purported confession,  
19 testimony by Samuelson relating to the lying in wait special circumstance, and Mr.  
20 Morales's alleged solicitation of murder of two prosecution witnesses.

21 Bruce Samuelson, however, a career criminal, with a history of violence and  
22 dishonesty, committed multiple acts of perjury, known to him and to the prosecution,  
23 but not the jury or judge, during his testimony. He was also a police agent.

24 Mr. Morales's confinement, therefore, is unlawful and his death judgment was  
25 unconstitutionally and mistakenly imposed in violation of his due process right to the  
26 enforcement of mandatory state laws, and his protection against the infliction of cruel  
27 and unusual punishments, as well as his rights to confrontation, compulsory process,  
28 present a defense, counsel and the effective assistance thereof, trial by a fair and

1 impartial tribunal, and guilt, death eligibility and penalty determinations untainted by  
2 false testimony and misinformation as guaranteed by the Fifth, Sixth Eighth and  
3 Fourteenth Amendments to the United States Constitution as a result of the fraud and  
4 misrepresentation perpetrated at trial.

5       Upon receipt of additional funds reasonably necessary to investigate this claim  
6 fully, and after having a full and fair opportunity to develop this claim through  
7 investigation, discovery, expert analysis and an evidentiary hearing, the following facts,  
8 among others, will be presented to support this claim:

9       1.     In California, in every case in which the jury has returned a death verdict,  
10 the defendant “shall” be deemed to have made a motion to modify the verdict.

11           a.     The trial judge then “shall” review the evidence, determine whether  
12 the jury’s findings are contrary to the law or evidence, and provide his reasons for his  
13 ruling on the record. The California Supreme Court then “shall” review a denial of  
14 modification. The word “shall” appears in the statute at least half a dozen times.  
15 California Penal Code section 190.4(e).

16           b.     Under that section the trial court *is required* to assess the credibility  
17 of the witnesses, determine the probative force of the testimony and weigh the evidence.  
18 *People v. Rodriguez*, 42 Cal.3d 730 (1986).

19           c.     Proceedings pursuant to California Penal Code section 190.4(e) are  
20 part of a constitutionally reliable and valid capital sentencing scheme. *Id.* at 794.

21           d.     The statute created a liberty interest protected by the federal  
22 guarantee of due process. The state’s misfeasance and that of its “key” witness deprived  
23 Mr. Morales of due process and defrauded the trial judge. This misconduct produced a  
24 death judgment anchored in false and misleading information that Mr. Morales was  
25 death-eligible.

26       2.     Contemporaneously with Mr. Morales’s trial, the prosecutor described  
27 jailhouse informer Bruce Samuelson in internal office documents as “*a key witness in*  
28 *prov[ing] Michael Morales 187 w/specials.*” Exhibit 2, District Attorney’s Position



1 Sheet on Bruce Samuelson. The prosecutor's deeds matched his words, as he begged a  
2 Superior Court judge to approve the bargain the prosecutor and Samuelson negotiated:

3 "He was not pulling any punches or holding back how strongly he  
4 felt that he *had to have the deal*. Mr. Garber was literally begging for  
5 the deal. He told the judge he had to have the deal he negotiated  
6 because he *needed* Mr. Samuelson's testimony to get a capital  
conviction against Mr. Morales and Samuelson would only testify  
with a deal."

7 Judge Saiers, who reluctantly approved the deal, told the prosecutor that "the next time"  
8 he would not care if Mr. Samuelson "turned in Attila the Hun," he would not agree to  
9 give Mr. Samuelson any more deals. Exhibit 3; Declaration of John C. Schick, Esq. at  
10 1-2; *see also* Exhibit 4, Declaration of The Honorable K. Peter Saiers.

11 3. The trial judge, like the prosecutor, had first hand knowledge of Mr.  
12 Samuelson's centrality to the case for death against Mr. Morales, identifying Samuelson  
13 as the "cornerstone" of the prosecution's case, "indispensable" to proving the lying in  
14 wait special circumstance finding, and "critical in tipping the balance of aggravating and  
15 mitigating circumstances in favor of death." Exhibit 1, Letter from the Honorable  
16 Charles R. McGrath at 1, 2.

17 4. Samuelson testified for the prosecution toward the end of the state's case  
18 during the guilt phase. Exhibit 31, Transcript of Trial Testimony of Bruce Samuelson at  
19 2330-73. As set forth more fully in Claim Two, below, the prosecutor knew that  
20 Samuelson's testimony was materially false in many respects; failed to disclose  
21 information which would have enabled the trial court and Mr. Morales's lawyer to have  
22 the same knowledge; and thereafter both elicited and failed to correct the false  
23 testimony.

24 5. A decade after trial, in August 1993 when respondent's counsel  
25 interviewed Samuelson, the state obtained evidence that Mr. Morales did not confess to  
26 Samuelson. Exhibit 15, Excerpts from Transcript of Interview of Bruce Samuelson  
27 (August 4, 1993), at 1.

28 a. Rather than complying with a self-executing duty to disclose that

1 transcript, respondent's counsel waited until November 1993 to mention the interview to  
2 petitioner's counsel who promptly made a written request for the transcript.  
3 Respondent's counsel provided the transcript on December 13, 1993, a month after the  
4 written request. Exhibit 32, Declaration of David A. Senior at 1.

5           b. In that interview Samuelson told respondent's counsel that he was  
6 able to talk to Mr. Morales about the crime only because both men were fluent in  
7 Spanish and therefore they could speak without being overheard by other guards and  
8 inmates. Exhibit 15, at 21, 23, 24-25.

9           c. This superficially plausible explanation -- given Mr. Morales's  
10 Spanish surname -- was a lie. Mr. Morales, a third or fourth generation American, does  
11 not speak any Spanish. Exhibit 16, Declaration of Lisa Flynn at 2; Exhibit 17,  
12 Declaration of John Morales at 2; Exhibit 18, Declaration of Josie Morales, at 2; Exhibit  
13 19, Declaration of Leonard Lucero, at 1-2.

14           d. It was factually impossible, under Samuelson's own admission and  
15 scenario, for him to have extracted a confession. Samuelson acknowledged that they  
16 would not have spoken English because they would not have had any privacy. They  
17 obviously did not speak Spanish and therefore the only reasonable conclusion is that  
18 they had no conversations in which Mr. Morales solicited murder or talked about the  
19 crimes with which he was charged.

20           6. Under oath at trial, Samuelson lied in his testimony that Michael Morales  
21 confessed to him about the crime. The configuration of the maximum security unit and  
22 the existence of a two way intercom system made private communication impossible.  
23 Exhibit 19 at 1; Exhibit 22, Declaration of Frank Moppins, at 2-3; Exhibit 20,  
24 Declaration of James Kevin Mahoney, at 2, 4-5. Samuelson's false testimony included  
25 particularly lurid details and the only evidence of a pre-existing, calculated plan to kill  
26 the victim, including but not limited to the facts that:

27           a. Mr. Morales waited to attack the victim until he got to the outskirts  
28 of town to avoid detection from outside sources. Exhibit 31, at RT 2337.

1           b.     Mr. Morales stabbed the victim because “the intent was to go out and  
2 kill her to begin with and he wanted to make sure. *Id.* at RT 2338-39.

3           c.     “The thought that had gone through his mind was there was no use  
4 wasting a good piece of – if it please the Court – a good piece of ass and that he would –  
5 there was – the effect that he was going to bone it.” *Id.* at RT 2338.

6           d.     After Mr. Morales stabbed the victim, he “got up, started to walk  
7 away and turned around and called her a fucking bitch.” *Id.* at RT 2339.

8           e.     After the crime, Mr. Morales put one of the weapons – a knife,  
9 according to Samuelson – in the refrigerator, and then went to the store and bought two  
10 packs of cigarettes and a six pack of beer. *Id.* at RT 2340.

11         7.     Under oath, Samuelson lied in testifying that Michael Morales asked him to  
12 kill prosecution witnesses Raquel Cardenas and Patricia Santiago Flores. *Id.* at RT  
13 2340-41.

14         8.     Under oath at trial Samuelson lied about the benefit he hoped to obtain  
15 from the prosecutor to enhance his credibility.

16           a.     *The benefit according to Samuelson’s testimony:* “It was stated that  
17 they would *recommend* a one-year county jail sentence with a felony conviction.” *Id.* at  
18 RT 2341. The deal was a promise “for a *recommendation.*” *Id.* at RT 2371; emphases  
19 supplied.

20           b.     *The actual deal:* The deal negotiated between Samuelson and the  
21 prosecutor was formalized on the record in municipal court on December 14, 1982.  
22 Exhibit 23, Transcript of Municipal Court Proceedings of December 14, 1982 in *People*  
23 *v. Samuelson*, at 1-2. The prosecutor begged the Superior Court to approve it because  
24 Mr. Samuelson would not testify without it and the prosecutor needed Mr. Samuelson’s  
25 testimony. Exhibit 3, at 1-2; Exhibit 4. In exchange for his testimony Samuelson was to  
26 plead guilty to two of the felony counts and be placed on five years probation on  
27 condition that he serve a year in county jail, make restitution, and obey other specified  
28 conditions. Exhibit 8, Probation Officer’s Report for Bruce Samuelson, filed May 26,

1 1983 at 3, 8; Exhibit 23, at 2. By the time Samuelson was sentenced he had 205 days  
2 credit toward his year of local time. Exhibit 8 at 3.

3 9. Samuelson obfuscated the extent to which he was in violation of his  
4 probation in order to enhance his credibility.

5 a. *His testimony*: He reported late to his probation officer in July and  
6 was arrested on new charges in November 1982. Exhibit 31 at RT 2349-51.

7 b. *The truth about his actual violations*: Samuelson did not report to  
8 his probation officer at all as required during July and August 1982. He appeared in  
9 September 1982 only in response to a “come in” letter. In October, he telephoned his  
10 probation officer with the “highly implausible excuse” that “he was going to be  
11 admitted to Stanford Medical Center for chemotherapy on two tumors.” Exhibit 6,  
12 Declaration of Vickie Hale Wetherell, dated February 7, 2006 at 1. He failed to make  
13 any payment on the \$1,711.78 in ordered restitution. Exhibit 7, Probation Officer’s  
14 supplemental Report for Bruce Samuelson, filed December 1982 at 2.

15 10. Under oath at trial, Samuelson misled the fact-finders about the reasons he  
16 was rejected from the California Youth Authority in 1981, claiming it was “because of a  
17 lack of bed space” and because “he was not amenable to their treatment.” Exhibit 31 at  
18 RT 2347. In fact he was rejected because of his “*extensive history* of delinquent and  
19 criminal behavior dating back to 1972.” Exhibit 6, Appendix A at 1; Exhibit 7 at 1.

20 11. Unknown to the judge, Samuelson’s reputation for honesty and veracity  
21 was dismal; he was a rapist, sexual predator, and sexual pervert, who raped his sister  
22 and stole from his own father. Exhibits 6, Appendix A at 1, 24-25 (pages 1-3 of  
23 Juvenile Record), Exhibit 12, Declaration of Paul Hermann at 1-2.

24 12. Unbeknownst to the trial judge, in May 1983, a month before the judge  
25 imposed a judgment of death on Mr. Morales, Samuelson wrote a letter to the probation  
26 department, spinning what the probation officer recognized to be an “elaborate  
27 preposterous story” to justify his 1981 and 1982 crime spree. Exhibit 6, at Appendix A  
28 at 2:

1           a.     “At the time, I was laid off by my employer, and as a result formed  
2 my own Co. to retaliate against him for his unfair labor practices. As with any new  
3 business, struggle (financial) and lack of business set in.” Exhibit 8 at 11 (Defendant’s  
4 Handwritten Version of Events).

5           b.     “During this period, there was also a family who I am very close to,  
6 that was denied welfare” in a decision that Samuelson deemed “not fair.” As a result he  
7 “took it upon” himself “to obtain money for groceries and bills.” This need to right a  
8 wrong, with Samuelson portraying himself as a 20th-century Robin Hood, was offered  
9 to account for his crimes in the Spring of 1981 and Fall of 1982. Samuelson declined to  
10 provide any information about the identity of this needy family. *Id.*

11           c.     The prosecutor knew about these incredible fantasies. He refrained  
12 from disclosing them and sat silent as the judge pronounced all of the prosecution  
13 witnesses credible and believable in June 1983 during the California Penal Code section  
14 190.4(e) hearing.

15         13.    If the trial judge – The Honorable Charles R. McGrath – had been aware  
16 of Samuelson’s perjury, he would not have allowed the death verdict to stand. Exhibit  
17 1, Letter from the Honorable Charles R. McGrath at 3. The following facts, among  
18 others, are undisputed:

19           a.     A confession is among the most probative and damaging evidence  
20 that can be admitted against a criminal defendant. *Id.* at 1.

21           b.     Samuelson’s testimony describing the confession was the only  
22 evidence to support the single constitutionally valid special circumstance – lying in  
23 wait. Exhibit 1 at 1.

24           c.     Samuelson was the only source of substantial aggravating evidence,  
25 including testimony that nearly two years after Mr. Morales’s arrest, he allegedly made  
26 obscene and derogatory references to the victim, callously boasted about the  
27 commission of the crime, and attempted to arrange the murder of two prosecution  
28 witnesses. Exhibit 1 at 2.

1 d. Samuelson's testimony about Mr. Morales's bragging and  
2 solicitation of further crimes both produced additional aggravating evidence by  
3 suggesting Mr. Morales would remain a serious and continuing danger even while  
4 confined in prison and extinguished the powerful mitigating circumstance of remorse.  
5 Exhibit 1 at 2.

6 e. Had the trial judge "been permitted to consider evidence of Mr.  
7 Samuelson's falsehoods that were belatedly discovered by the Attorney General and  
8 Mr. Morales's attorneys," he "would not have let the death sentence stand" because to  
9 do so "would constitute a grievous and freakish injustice." Exhibit 1 at 3.

10 **B. Claim Two: The Prosecutor Committed Multiple Acts of Misconduct in**  
11 **Violation of Mr. Morales's Constitutional Rights in the Presentation of Bruce**  
12 **Samuelson's Testimony.**

13 The prosecution's "indispensable" witness for proof of the special circumstance  
14 allegation, Bruce Samuelson, had compiled a debilitating reputation as a liar and an  
15 extensive record of criminality involving crimes of moral turpitude by the time he was  
16 called to testify against Mr. Morales. He had no compunction about lying to probation  
17 officers, judges, family members, employers, and, of course the jurors and judge in Mr.  
18 Morales's case. The prosecutor was fully aware of Bruce Samuelson's character and  
19 knew of his particular, numerous and egregious lies. The prosecutor intentionally  
20 breached his affirmative duties to disclose material exculpatory evidence (including  
21 impeaching evidence) and refrain from actively and knowingly presenting false or  
22 misleading evidence; protect the system against the use of false testimony; avoid the  
23 creation of false inferences; and advocate in a manner consistent with his constitutional  
24 duty to "serve truth and justice first," rather than "tack as many skins of victims as  
25 possible to the wall."<sup>1</sup> Mr. Morales's lawyer also breached his duty to his client through  
26 a lackadaisical investigation and cross-examination that enabled Samuelson to face the  
27

28 <sup>1</sup> See *United State v. Kojayan*, 8 F.3d 1315, 1323 (9th Cir. 1993).

1 jury cloaked in a false coat of veracity.

2 As a result of this conduct, Mr. Morales's confinement is unlawful and his  
3 convictions and death sentence were obtained in violation of his rights against  
4 compelled self-incrimination, and to due process, a fair trial, a fair and impartial jury,  
5 the effective assistance of counsel, confrontation, compulsory process, present a  
6 defense, the enforcement of mandatory state laws, adequate due process notice of the  
7 evidence against him, and fair, reliable, rational, non-arbitrary, and accurate  
8 determinations of guilt, death eligibility, and penalty by a jury that was not misled and  
9 infected by false and misleading evidence, inferences, and argument as guaranteed by  
10 the Fifth, Sixth, Eighth and Fourteenth Amendments.

11 Upon receipt of adequate funds reasonably necessary to investigate this claim  
12 fully and after having a full and fair opportunity to develop this claim through  
13 investigation, discovery, expert analysis and an evidentiary hearing, the following facts,  
14 among others, will be presented to support this claim:

15 1. Those facts set forth in Claims One, Three and Four, and the exhibits cited  
16 therein, and the facts in the exhibits cited herein as if fully set forth in this claim.

17 2. The prosecutor knowingly elicited false and perjurious testimony from  
18 Samuelson about the contours of his agreement with the prosecutor and the nature of the  
19 benefits provided to him in exchange for his testimony.

20 a. The prosecutor intentionally elicited from Samuelson the testimony  
21 that the offer from the District Attorney in exchange for his testimony was no more than  
22 "it was stated that *they would recommend* a one-year county jail sentence with a felony  
23 conviction." Exhibit 31 at RT 2341; emphasis supplied. Samuelson reiterated on cross-  
24 examination that the only promise made was "for a *recommendation*." Exhibit 31 at RT  
25 2371; emphasis supplied.

26 b. That testimony was materially false. In December 1982, the  
27 prosecutor and Samuelson negotiated an explicit agreement together whereby  
28 Samuelson would testify against Mr. Morales in exchange for which Samuelson would

1 plead guilty to two of the six felony charges against him, the rest would be dismissed  
2 and he would receive probation with a guarantee of “local time,” meaning a sentence of  
3 no more than a year in the county jail, rather than a commitment to state prison.  
4 Because of the custody credits Samuelson already had accumulated, the disposition  
5 essentially allowed him to be released soon after he testified. Additionally, he did not  
6 face any additional punishment for violating his existing felony probation. Exhibit 23 at  
7 1-3.

8 c. The Superior Court was so reluctant to approve the deal that the  
9 prosecutor had to “push very hard,” literally begging the judge to let the deal go forward  
10 because the prosecutor “had to have the deal.” He explained that he *needed*  
11 Samuelson’s testimony to secure a capital murder conviction against Mr. Morales and  
12 that Samuelson would not testify without a guaranteed deal. Exhibit 3 at 2.

13 d. In order to seal the deal, the prosecutor had one of his investigator’s  
14 administer a polygraph to Samuelson. The investigator was not a qualified polygrapher,  
15 but he pronounced Samuelson truthful. Exhibit 13, District Attorney Investigation  
16 Report by Lee Copeland re Polygraph, at 1-2. Evaluation of the test data and results by  
17 a certified professional polygrapher would have revealed that Samuelson was deceptive  
18 in his answers denying that he obtained his information about the case from a source  
19 other than Mr. Morales. Exhibit 14, Confidential Report by Francis M. Connolly –  
20 January 24, 1994 at 3.

21 e. When the Superior Court judge finally approved the deal, he warned  
22 the prosecutor that “the next time” he would not care if Mr. Samuelson “turned in Attila  
23 the Hun,” the judge would not approve another deal for Samuelson. Exhibit 3 at 2.

24 f. The plea bargain greatly upset Samuelson’s probation officer, who  
25 expressly asked the judge assigned to the case to take note of Samuelson’s criminal  
26 history and lack of compassion for the victims in sentencing Samuelson. The probation  
27 officer “had no doubt” that but for the plea bargain, Samuelson would have been  
28 sentenced to prison. Exhibit 6 at Appendix A at 3. The probation officer described



1 Samuelson as anti-social, and found his handwritten letter to the probation department  
2 attempting to justify his conduct as particularly shocking. Exhibit 6 at Appendix A at 2.

3 g. The prosecutor exacerbated his unconstitutional behavior during  
4 Samuelson's testimony by later expressly arguing at the conclusion of the guilt phase  
5 that "in exchange for his testimony he was given *an offer of a recommendation* that he  
6 get a year in jail, a maximum of a year in jail instead of state prison." RT 2558;  
7 emphasis supplied.

8 3. The prosecutor did not correct, and knowingly allowed, Mr. Samuelson to  
9 offer false testimony and commit perjury by testifying that his probation violation  
10 stemmed only from the new criminal charges and his tardy appearance in July 1982 at  
11 his probation officer's office. Exhibit 31 at RT 2349-51.

12 a. In fact, Samuelson was released from jail in June 1982 and made one  
13 appearance, rather than the required monthly visits to his probation officer.

14 b. He failed to report to his probation officer at all in July and August.  
15 He appeared in September only in response to a "come in" letter.

16 c. In October, he telephoned his probation officer with the "highly  
17 implausible excuse" that "he was going to be admitted to Stanford Medical Center for  
18 chemotherapy on two tumors." Exhibit 6 at Appendix A at 1.

19 d. By the following month, November 1982, Samuelson had committed  
20 new burglaries, forgeries, car theft, and absconded to Arizona, where he was arrested in  
21 a stolen car.

22 e. He also failed to make any payment on the \$1,711.78 in ordered  
23 restitution. Exhibit 7 at 2.

24 4. The prosecutor knowingly allowed Samuelson to offer perjured testimony  
25 that he was rejected from the California Youth Authority in 1981 "because of a lack of  
26 bed space." Samuelson added the "further revelation" was "because I was not amenable  
27 to their treatment." Exhibit 31 at RT 2347. Samuelson was in fact rejected by the  
28 Youth Authority because of his "extensive history of delinquent and criminal behavior

1 dating back to 1972.” Exhibit 7, at 1. The prosecutor also knew that Samuelson was on  
2 Youth Authority parole at the time he committed the 1981 felonies and that the  
3 probation department recommended a prison sentence. Exhibit 6, Appendix A at 2;  
4 Exhibit 7 at 2.

5 5. The prosecutor knowingly allowed Samuelson to commit perjury and  
6 testify falsely that Mr. Morales solicited Samuelson to murder trial witnesses Patricia  
7 Santiago Flores and Raquel Cardenas; that Mr. Morales admitted a pre-existing plan or  
8 intention to kill the victim; that Mr. Morales confessed to the crime; and that Mr.  
9 Morales confessed to raping the homicide victim and described the incident in vulgar  
10 terms. The prosecutor was aware that the configuration in the maximum security unit  
11 and the existence of a two way intercom system made the private communication  
12 described by Samuelson virtually impossible. Exhibit 19, at 1; Exhibit 22 at 2-3.

13 6. The prosecutor was aware of Samuelson’s extensive juvenile record, yet he  
14 created the false impression during closing argument that Samuelson was a nonviolent  
15 thief, burglar and forgerer. RT 2558-59.

16 a. The prosecutor knew the identity of Samuelson’s probation officer  
17 and had her business card. Exhibit 2. He either knew of Samuelson’s prior record and  
18 current problems or breached a duty to obtain that information from a governmental  
19 agency (the Probation Department) to which he had ready access.

20 b. Had Samuelson’s juvenile record been disclosed and investigated,  
21 the jury would have learned that Samuelson was a violent offender and a habitual liar.

22 c. Unknown to the judge and jury – but known to the prosecutor –  
23 Bruce Samuelson had a lengthy juvenile record, including rape, known to Samuelson’s  
24 probation officer. Exhibit 6 at Appendix A at 1.

25 d. Samuelson’s juvenile record, though not available to the public was  
26 available to the prosecutor and showed that Samuelson’s sister was the victim of at least  
27 his first rapes. Exhibit 6 at Appendix at 26 (Juvenile Record at 2.)

28 7. The prosecutor falsely and repeatedly argued repeatedly to the jury that he

1 did not need Samuelson's testimony to attain guilt verdicts against Mr. Morales. RT  
2 Closing Arguments 2559, 2664. The prosecutor's handwritten file notes tell a different  
3 story, i.e., that Samuelson was "*a key witness*" for obtaining a special circumstances  
4 murder verdict. The prosecutor's frantic begging on behalf of Samuelson for the  
5 negotiated deal is indicative of Samuelson's true worth to the prosecution. Exhibit 2;  
6 Exhibit 3 at 2.

7 8. The prosecutor knew Paul Hermann, a Stockton businessman and the  
8 principal victim of Samuelson's 1981 and 1982 crimes, believed that society had to be  
9 protected from Bruce Samuelson "by whatever means necessary." Hermann discussed  
10 his beliefs with Samuelson's probation officer. Exhibit 8 at 6. The prosecutor was in  
11 contact with the probation officer. Exhibit 2 at 4. Had Mr. Hermann been contacted by  
12 Mr. Morales's trial counsel or by the prosecutor the jury would have heard the following  
13 information:

14 a. Mr. Samuelson burglarized Paul Hermann's family-owned  
15 commercial real estate business in May 1981 and twice more in 1982.

16 b. Hermann recognized the earmarks of a sophisticated thief in  
17 Samuelson's method of stealing checks from the middle, not the top of the stack; he  
18 then used the office typewriter to type his name, and he made each check out for a small  
19 enough amount that it would not arouse suspicion and would be cashed at a retail store  
20 without verifying the validity.

21 c. When he was caught, Samuelson lied and denied breaking into the  
22 office. Hermann exposed this lie with the fact that his mother found Samuelson's name  
23 imprinted on the typewriter ribbon.

24 d. After he pled guilty, Samuelson wrote a letter of apology and then  
25 asked Hermann for a job. He burglarized Hermann twice after making that apology and  
26 request for employment.

27 e. Hermann believed that Samuelson's deal, about which he had no  
28 knowledge before it was cut, was "irresponsible." Had he known about it, he would

1 have protested. Had he been contacted, he would have testified, based on his family's  
2 extensive and unfortunate experience with Samuelson, that he was a "liar and  
3 manipulator who would deceive anyone to get ahead without regard to the  
4 consequences." Exhibit 12 at 1-3.

5 9. Samuelson's pre-trial career as a liar, thief, and sexual predator was  
6 mimicked by his post-trial pattern of behavior and gives a lie to the prosecution's  
7 current assertion during clemency proceedings that had there been a post-conviction  
8 evidentiary hearing Samuelson's credibility would have been readily demonstrated.

9 a. From 1984 until at least 1994, Samuelson was a violent batterer and  
10 spousal abuser. Exhibit 10, Declaration of Sarah Samuelson, at 1-6; Exhibit 25,  
11 Excerpt of Court File in *State v. Samuelson*, County of Ada, Fourth Judicial District  
12 Case No. HCR20074, at 4, 6. He was a sadistic child abuser as well. Exhibit 11,  
13 Declaration of Bruce Samuelson, Jr., at 1, 2-3; Exhibit 9, Declaration of Sabrina  
14 Samuelson, at 1-2.

15 b. Samuelson was a violent sexual predator, and a sexual pervert, who  
16 repeatedly forced himself on minors. He was fired from a job as a telemarketer for the  
17 Special Olympics because he made lewd phone calls to women he was soliciting for  
18 donations. Exhibit 10 at 2-3.

19 c. He repeatedly stole other people's identities and ran up large debts  
20 in their names. His victims included a lawyer in Oregon and his own son and  
21 namesake. Exhibit 9 at 2; Exhibit 10 at 4; Exhibit 11 at 1.

22 d. He habitually embezzled money and stole goods from his  
23 employers; he defrauded insurance companies, failed to pay rent, and vandalized  
24 numerous businesses for amusement. Exhibit 10 at 3-5; Exhibit 9 at 2.

25 e. In light of this enduring pattern of deception, opportunism, and  
26 deviancy, it is unlikely that any court would find now that Mr. Samuelson's credibility  
27 can be readily demonstrated.

28 10. Respondent and his counsel now know, beyond any shadow of a doubt

1 that Bruce Samuelson is a liar with a poor reputation for honesty. Respondent's  
2 counsel's own 1993 conversation with Mr. Samuelson, combined with his character  
3 and record since testifying against Mr. Morales, requires respondent's counsel, as part  
4 of a continuing duty to correct injustices wrought by false and perjurious testimony, to  
5 take affirmative action. Instead they stand mute, despite their awareness of the  
6 following facts, among others:

7           a.     The facts set forth in subsection 9, immediately above.  
8           b.     The facts set forth in Claim One, subsections 5 and 12.  
9           c.     In addition to Samuelson's case-breaking lie about the language in  
10 which his conversations occurred in the jail, he proffered a preposterous and verbose  
11 explanation about the circumstances surrounding his burglary of Paul Hermann's real  
12 estate office, the cashing of several forged checks, and the vehicle theft that contains  
13 not a shred of truth.

14           d.     Samuelson also offered a very different explanation of how he  
15 came to be housed in the same unit as Morales than he offered at trial.

16                   (i)     At trial Samuelson testified that he was housed in that unit  
17 "at the request of the jail commander" because he had a "snitch jacket," Exhibit 31 at  
18 RT 2365-66, and because he was "taking administration of justice as a major." Exhibit  
19 31 at 2366.

20                   (ii)    In his 1993 statement Samuelson offered many new and  
21 varied reasons: "Primarily because I wanted to be away from everybody else where I  
22 could study." Exhibit 15 at 9. He also said he asked to be put in "Ad Seg," because he  
23 was having problem with nosey inmates. Exhibit 15 at 11. Finally, he offered yet  
24 another explanation for his presence in "the hole:" He was facing federal charges for  
25 check writing "because the dollar amount and the fact that they were inter-  
26 jurisdictional and so automatically San Joaquin County segregates you for any federal  
27 charges." Exhibit 15 at 12. His check-cashing was not inter-jurisdictional and the  
28 amount of each check was sufficiently small so that the retail establishment where he

1 cashed the check would not verify his identity.

2 (iii) The internal inconsistencies expose these rationales as lies as  
3 does opinion of experienced counsel that the jail was so crowded in 1982 that the  
4 luxury of a single cell was difficult to achieve and not likely to be afforded to Mr.  
5 Samuelson for any of his stated reasons. Exhibit 3 at 2.

6 11. The past and continuing violations of Mr. Morales's constitutional rights  
7 by the state's failure to correct false testimony, failure to disclose material evidence, and  
8 elicitation of perjured testimony had a substantial and injurious influence and effect on  
9 the factfinder. Cumulatively, or alone the errors were prejudicial.

10 a. Samuelson's testimony was designed to shore up the testimony of  
11 Raquel Cardenas and Patricia Flores, whom the jurors were free to view as accomplices.  
12 If the jurors determined that the women were accomplices, then their testimony would  
13 have to be independently corroborated.

14 b. The prosecutor used Samuelson's testimony in precisely this fashion  
15 during his guilt phase closing arguments. RT 2558-61, 2663-65.

16 c. During both the guilt and penalty phase closing arguments, the  
17 prosecutor used Bruce Samuelson to highlight and support testimony from Pat Flores  
18 that was questionable at best concerning an alleged threatening gesture toward Flores by  
19 Mr. Morales with the hammer on the morning of his arrest. According to the police  
20 officers, however, the hammer was in the vegetable crisper and Mr. Morales was in bed  
21 when police officers barged into the bedroom. RT 2558, 3093.

22 d. During the penalty phase, the prosecutor reminded the jury at the  
23 end of his argument about Samuelson's dramatic and colorful testimony about the  
24 crime's most lurid details. RT 3093. This portion of the prosecutor's closing argument  
25 was virtually a direct quote from the most incendiary remarks attributed to Mr.  
26 Morales by Samuelson's guilt phase testimony. Exhibit 31 at 2337, 2338, 2339 and the  
27 jurors were directed to consider testimony from the guilt phase in selecting the  
28 appropriate punishment. Exhibit 1 at 2; RT 3142-43, 3145.

**C. Claim Three: The Admission of Bruce Samuelson's Testimony Violated Mr. Morales's Constitutional Rights Because He Was An Unlawful Police Agent.**

At the time Bruce Samuelson engaged Mr. Morales in conversation and attempted to question him about the charges against him, Samuelson was a police agent within the meaning of *United States v. Massiah*, 377 U.S. 201 (1964). He had an established relationship with law enforcement, was already trying to inform on another inmate, James Kevin Mahoney, and was placed in the maximum security tank so that he could elicit information. When he was unsuccessful in eliciting incriminating information from Mr. Morales, he used his placement in the tank and proximity to Mr. Morales as an opportunity to fabricate a confession and gain access to legal paperwork in Mr. Morales's possession. For these reasons, Mr. Morales's confinement is unlawful and his judgments of conviction and death were unconstitutionally obtained in violation of his protection against the imposition of cruel and unusual punishment and his rights to due process, a fair trial, counsel, the effective assistance of counsel, reliable determinations of guilt and punishment, confrontation, a fair and impartial jury, and a trial free of materially false and misleading evidence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Upon receipt of adequate funds reasonably necessary to investigate this claim fully, and after having a full and fair opportunity to develop this claim through investigation, discovery, expert analysis and an evidentiary hearing, the following facts, among others, will be presented to support this claim:

1. Those facts set forth in Claims Two and Four, and the Exhibits cited therein, which are incorporated by this reference as if fully set forth herein.

2. At the time Samuelson was placed in the maximum security tank in the San Joaquin County Jail, Mr. Morales was represented by counsel and criminal proceedings had been initiated against him.

3. Samuelson engaged in activity that went beyond mere listening. He was acting as a government agent, i.e., under the direction of the government pursuant to a

1 preexisting arrangement, with the expectation of some resulting benefit or advantage.

2 4. Samuelson was placed by law enforcement in a six-cell maximum security  
3 tank housing offenders whom the jail personnel identified as gang members or whose  
4 charges involved violent felonies. Mr. Samuelson's inmate classification profile did not  
5 fit in either category, and his placement there was highly irregular. Exhibit 21,  
6 Declaration of Ruben Serna, at 1-3.

7 5. On December 6, 1982 Samuelson handed prosecutor Garber a letter  
8 pursuant to and evidencing their pre-existing relationship including but not limited to  
9 work he was already doing for the prosecution in the James Mahoney case and  
10 explained that he had "further testimony" in that case. Exhibit 5, Letter from Bruce  
11 Samuelson Handed to Prosecutor Bernard Garber on December 6, 1982, at 1.

12 6. His work for the government on the Mahoney case apparently began during  
13 the second week of November. Exhibit 20, Declaration of James Kevin Mahoney, at 1-  
14 5.

15 7. In his note, Samuelson guaranteed a first-degree murder conviction with  
16 special circumstances. Exhibit 5 at 1. Someone familiar with the case would have had  
17 to tell Samuelson what special circumstances were charged against Mr. Morales and the  
18 legal elements of them.

19 8. Samuelson concluded his note by promising his prosecutorial patron that  
20 the information he had concerning Mr. Morales was going to be "quite a bit more than  
21 you expected." Exhibit 5 at 2. In order for the prosecutor to have any expectation, there  
22 had to have been a pre-existing relationship and discussion of what the prosecutor  
23 wanted, needed, or expected.

24 9. Samuelson expected and bargained vigorously for a benefit. While the  
25 benefit fell short of his written requests in Exhibit 5, they were nonetheless substantial.  
26 He and the prosecutor memorialized the deal on December 14, 1982 in municipal court  
27 after an unreported conference with the two of them and the municipal court judge.  
28 Exhibit 23 at 1-2. The bargain was a *quid pro quo* for testimony that the prosecutor



1 knew he needed. Exhibit 2, Exhibit 3 at 2.

2 10. Samuelson deliberately and aggressively questioned Mr. Morales. Exhibit  
3 20 at 3-4.

4 11. The violation of Mr. Morales's constitutional rights was prejudicial.  
5 Although Mr. Morales did not answer Samuelson's questions, Samuelson's agency  
6 status enabled him to be in sufficiently close proximity to Mr. Morales to make his  
7 claims that Mr. Morales confessed plausible to lay jurors and to look at Mr. Morales's  
8 legal paperwork concerning his case.

9 12. But for the testimony of Mr. Samuelson, Mr. Morales would not have been  
10 convicted of first degree special circumstances murder.

11 a. Samuelson's testimony was designed to shore up the testimony of  
12 Raquel Cardenas and Patricia Flores, whom the jurors were free to view as accomplices.  
13 If the jurors determined that the women were accomplices, then their testimony would  
14 have to be independently corroborated.

15 b. The prosecutor, used Samuelson's testimony in precisely this fashion  
16 during his guilt phase closing arguments. RT 2558-61, 2663-65

17 c. During the penalty phase, the prosecutor reminded the jury at the end  
18 of his argument about Samuelson's dramatic and colorful testimony about the crime's  
19 most lurid details. RT 3093.

20 13. The constitutional violation therefore had a substantial and injurious  
21 influence and effect on the jury's determination of the verdicts at the guilt and penalty  
22 phases.

#### 23 **D. Claim Four: Mr. Morales is Innocent of Capital Murder**

24 Mr. Morales stands convicted of one count of capital murder and one special  
25 circumstance. The "indispensable" testimony to prove the truth of the special  
26 circumstance, rendering Mr. Morales death-eligible, came from the constitutionally  
27 infirmed, now wholly discredited testimony of Bruce Samuelson. In addition,  
28 uninvestigated information about Mr. Morales's history of drug abuse and his drug use

1 on the day of the offense, as explained by a psychiatrist with a specialty in  
2 psychopharmacology, show him to be innocent of capital murder.

3 Consequently, Mr. Morales's confinement is unlawful and his conviction and  
4 death sentence were obtained in violation of his protection against the infliction of cruel  
5 and unusual punishment, and his rights to due process; equal protection; conviction  
6 upon proof beyond a reasonable doubt; counsel and the effective assistance thereof; a  
7 fair trial; confrontation and compulsory process; present a defense; a fair and impartial  
8 jury; reliable guilt, special circumstance, and penalty verdicts by a jury untainted by  
9 misinformation; and the enforcement of mandatory state laws as guaranteed by the  
10 Fifth, Sixth, Eighth, and Fourteenth Amendments.

11 Mr. Morales's claim of innocence requires that he make a showing that he is  
12 probably innocent. His showing is, as it must be "truly persuasive." *Herrera v. Collins*,  
13 506 U.S. 390, 417 (1993); *Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997)  
14 (explaining *Herrera* standard), and he readily meets this standard.

15 Upon receipt of adequate funds reasonably necessary to investigate this claim  
16 fully, and after having a full and fair opportunity to develop this claim through  
17 investigation, discovery, expert analysis and an evidentiary hearing, the following facts,  
18 among others, will be presented to support this claim:

19 1. Without Bruce Samuelson's testimony that Mr. Morales "confessed" his  
20 intent to kill and his testimony about the "preparations" made to commit the crime, no  
21 finding against Mr. Morales on the lying in wait special circumstance would have been  
22 possible. Exhibit 1 at 2.

23 2. The prosecutor knew that at the time he wrote the file notes and at the time  
24 he begged for the negotiated deal. Exhibit 2; Exhibit 3 at 2.

25 3. Bruce Samuelson has been thoroughly discredited as having testified  
26 falsely to Mr. Morales's non-existent confession, solicitation of murder, and crude  
27 comments about Ms. Winchell. Exhibit 14 at 1-3; Exhibit 16 at 1-2; Exhibit 17 at 1-2;  
28 Exhibit 18 at 1-2; Exhibit 19 at 1-2; Exhibit 20 at 1-6; Exhibit 21 at 1-3; Exhibit 15, 1-

1 28.

2 4. Bruce Samuelson's general reputation for honesty and veracity is  
3 extremely poor. Rarely has such a diverse group of individuals -- family members,  
4 probation officers, and crime victims -- spoken with such unanimity about the lack of  
5 credibility of a prosecution witness. Exhibit 6; Exhibit 9 at 1-3; Exhibit 10 at 1-6;  
6 Exhibit 11 at 1-4; Exhibit 12 at 1-3.

7 5. Rick Ortega informed the arresting officers -- consistently from the time of  
8 his initial statement -- that there was never a plan to kill or ambush and kill Terri  
9 Winchell. Exhibit 26, Excerpt from Ricky Ortega's Statement to Law Enforcement on  
10 January 11, 1981 at 2-9.

11 6. Throughout the litigation of Mr. Morales's case, the state has offered  
12 numerous facts to "corroborate" Samuelson's testimony that Mr. Morales confessed to a  
13 pre-conceived plan to kill the victim; the state understands that under the facts of this  
14 particular case, without a pre-existing plan and intent to kill there is no lying in wait.  
15 Even if there were testimony at trial which could support a murder conviction on a  
16 theory other than lying in wait, that testimony does not change the fact that the only  
17 evidence that the crime was committed while Mr. Morales was lying in wait to kill the  
18 victim, i.e., the special circumstance, came from Samuelson.

19 a. The state has relied on facts that are not supported in the record  
20 without Samuelson's testimony, including but not limited to the alleged "fact" that the  
21 men lured the victim into the car and that she was assigned the front passenger seat.  
22 This is incorrect: Rick Ortega, not the two men, met the victim at the shopping mall  
23 and brought her to Mr. Morales's residence. Because there was only one passenger,  
24 she occupied the front seat.

25 b. Post-crime consciousness of guilt evidence that Mr. Morales and  
26 Mr. Ortega were aware of the general criminal conduct provides no evidence of pre-  
27 crime intent.

28 c. Pre-crime activities that are consistent with an assault or homicide,

1 but not necessarily indicative of a lying-in-wait special circumstance, do not  
2 corroborate Samuelson.

3 d. Acknowledgments by Mr. Morales of criminal conduct, such as his  
4 early expressions of regret – before his arrest – for having been involved in the crime,  
5 statements to a psychologist retained by his trial counsel, and his statement of remorse  
6 to the trial court at the time of sentencing are not acknowledgments of capital murder.

7 7. There is no longer any basis for finding Mr. Morales death-eligible. The  
8 Court should grant this writ or, alternatively afford him an evidentiary hearing at which  
9 he will prove his innocence of special circumstance murder.

10 8. In addition, Mr. Morales's long history of drug abuse, Exhibit 29,  
11 Declaration of Julio Marquez, at 1-2; Exhibit 30, Declaration of Manuel Franco  
12 Vasquez, at 1-3, and his intoxication as a result of the consumption of a substantial  
13 quantity of a high potency alcohol and of a half of a joint laced with phencyclidine  
14 within an hour of the crime, Exhibit 28, Declaration of Luana Horstkotte, at 1-3,  
15 produced a psychotic, disinhibited mental state during which Mr. Morales was not  
16 wholly aware of or in control of his actions. Exhibit 33, Declaration of Pablo Stewart,  
17 M.D., at 8.

18 9. PCP is a psychotomimetic – a substance that induces psychosis. The  
19 hallmark of its cognitive and behavioral impacts is the ease with which users lose  
20 contact with reality. The psychomotor effects, strong dissociation of mind and body,  
21 and bizarre psychotic or violent behavior associated with PCP intoxication may leave  
22 users capable of physical activities involving gross and fine motor functions that are  
23 performed independent of and unmediated by the judgment and reasoning functions of  
24 the frontal lobes of the brain. Exhibit 33 at 7.

25 10. The facts of the crime and descriptions of Mr. Morales's behavior are  
26 consistent with the conclusion that he responded on a purely reactive level to Ortega's  
27 and the victim's behavior and was unable to perceive, assess or calibrate the nature of  
28 his reaction. The effects of the PCP disconnected Mr. Morales from a physical

1 awareness of the assault. Exhibit 33 at 8. For this reason as well, Mr. Morales is not  
2 guilty of capital murder.

3 11. Mr. Morales's innocence of capital murder requires the Court to consider  
4 the substantial and serious constitutional violations alleged herein.

5  
6 **IV. PRAYER FOR RELIEF**

7 WHEREFORE, petitioner Michael Angelo Morales prays that this Court:

8 1. Take judicial notice of the contents of the certified record on appeal and  
9 all pleadings, orders and other documents filed in petitioner's state court proceedings --  
10 *People v. Morales*, California Supreme Court No. S004552; *In re Morales*, California  
11 Supreme Court No. S030276; *In re Morales*, California Supreme Court No. S032386;  
12 and *In re Morales*, California Supreme Court No. S141074 -- and all pleadings,  
13 documents and papers filed in this Court in *Morales v. Vasquez*, Case No 91-CV-  
14 00862 DT and on file with the Court of Appeals for the Ninth Circuit in *Morales v.*  
15 *Woodford*, Case No. 99-99020;

16 2. Issue an immediate stay of Mr. Morales's execution, set for February 21,  
17 2006 at 12:01 a.m.;

18 3. Order respondent to show cause why Petitioner is not entitled to the relief  
19 sought;

20 4. Grant petitioner the right to seek sufficient funds and time to secure  
21 additional investigative and expert assistance as necessary to prove the allegations in  
22 this petition;

23 5. Order the San Joaquin County District Attorney and the prosecuting  
24 deputy district attorneys to turn over all files related to Mr. Morales's case and grant  
25 Mr. Morales leave to conduct discovery, including the right to take depositions, request  
26 admissions, propound interrogatories, issue subpoenas for documents and other  
27 evidence, and afford petitioner the means to preserve the testimony of witnesses;

28 6. Order an evidentiary hearing at which Mr. Morales will offer this and

1 further proof in support of the allegations set forth herein;

2 7. Permit petitioner a reasonable opportunity to supplement the evidentiary  
3 showing in support of the claims presented here, and to supplement the petition to  
4 include claims that may become known as the result of further investigation and  
5 information which may hereafter come to light;

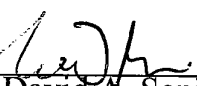
6 8. After full consideration of the issues raised in this petition, considered  
7 cumulatively and in light of the errors alleged previously in this Court, grant the writ  
8 and vacate the judgment and sentence imposed on petitioner in Ventura County  
9 Superior Court, Case No. 17960; and

10 9. Grant petitioner such further relief as is just and proper.

11 Dated: February 17, 2006

Respectfully Submitted,

12  
13 McBreen & Senior

14  
15   
16 By: David A. Senior, Esq.  
17 Attorneys for Petitioner Michael A. Morales  
18  
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**VERIFICATION**

I, David A. Senior, declare and state:

I am an attorney admitted to practice law in the State of California, and before this United States District Court. I represent petitioner herein, who is confined and restrained of his liberty at San Quentin State Prison, San Quentin, California.

I am authorized to file this petition on Mr. Morales's behalf. I make this verification on petitioner's behalf because Mr. Morales is incarcerated in a county different from that of my office.

I have reviewed the foregoing Petition for Writ of Habeas Corpus and believe the contents of the petition to be true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 17, 2006 at San Francisco, California.

  
\_\_\_\_\_  
DAVID A. SENIOR

## **PROOF OF SERVICE**

I, Kathleen T. Saenz, declare that I am a citizen of the United States, employed in the City and County of Los Angeles, I am over the age of 18 years and not a party to this action or cause, my current business address is 1880 Century Park East, Suite 1450, Los Angeles, CA 90067.

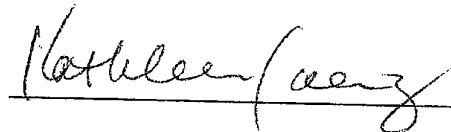
On February 17, 2006, I served a true copy of the following documents:

**APPLICATION TO FILE SUCCESSOR PETITION FOR WRIT OF HABEAS  
CORPUS AND REQUEST FOR STAY OF EXECUTION, PETITION FOR WRIT  
OF HABEAS CORPUS BY A PRISONER IN CUSTODY, AND EXHIBITS IN  
SUPPORT THEROF**

on the following in said cause by causing to be hand-delivered a true copy thereof in a sealed envelope to the following address:

Dane R. Gillette  
Sr. Asst. Attorney General  
Office of the Attorney General  
455 Golden Gate Avenue, Suite 11000  
San Francisco, CA 94102

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 17, 2006.

A handwritten signature in black ink, appearing to read 'Kathleen Saenz', is written over a horizontal line.

Kathleen T. Saenz